

# Religious Regulation Meets International Trade Law: Halal Measures, a Trade Obstacle? Evidence from the SPS and TBT Committees

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## ABSTRACT

The article studies the intersection of religious regulation and trade law. Specifically, it provides evidence about whether, when, and how domestic Halal measures are regarded as trade obstacles under World Trade Organization law. We conduct a systematic content analysis of Halal measures as a trade concern in the work of the Sanitary and Phytosanitary Measures and the Technical Barriers to Trade Committees, by analysing notifications of domestic Halal measures and Specific Trade Concerns raised. On this basis, we identify the five most pressing trade concerns relating to Halal measures in International Economic Law.

## I. INTRODUCTION

This article studies Halal regulation in International Economic Law, specifically whether countries' domestic regulatory measures about Halalness are regarded as trade obstacles under World Trade Organization (WTO) law. Our research provides empirical evidence to answer this question by analysing the Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) Committees' documentation.

Under Islamic law, the concept of *Halal* means permissible, allowed, and legal; it is opposed to *haram*, which means not allowed, forbidden.<sup>1</sup> Halalness governs what products and services Muslims may consume, notably food, pharmaceuticals, cosmetics, and others. Halal also postulates requirements about raw materials used, the production process, and product storage. Halal

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<sup>1</sup> Marco Tieman and Faridah Hj Hassan, 'Convergence of Food Systems: Kosher, Christian and Halal', 117 (9) British Food Journal 2313–27 (2015), <https://doi.org/10.1108/BJF-02-2015-0058>.

requirements are largely credence goods and services in that consumers cannot readily ascertain their Halal compliance. As a result, Halalness is commonly certified by private or national public standards.

With 25% of the world population being Muslim, Halal is of truly global dimension;<sup>2</sup> and Halal product shares are projected to grow on global markets,<sup>3</sup> making Halal regulation non-negligible for world trade. As a religious concept that governs the Muslim community, Halal is neither potentially universal nor is it clearly territorially delimited—it thereby challenges secular and nation state-based trade laws and institutions. Importantly, even within the Muslim community, different fragmented interpretations of Halal exist.<sup>4</sup> Halal harmonization among different Muslim and Islamic countries thus equally remains a challenge.<sup>5</sup> This has resulted in a drastic increase in Halal regulation, which comprises more national Halal-related legislation, and the creation of a multitude of private and public Halal standards and accreditation bodies at international and national levels.<sup>6</sup>

At the international level, Halal Guidelines for the use of the term ‘Halal’ were adopted by the Codex Alimentarius Commission, an intergovernmental food standard-setting body set up jointly by the Food and Agriculture Organization (FAO)/World Health Organization (WHO) with quasi global membership.<sup>7</sup> However, as we show below, these fall short of constituting an exhaustive and uniform Halal standard.<sup>8</sup> Consequently, a multitude of other halal standards are used in international trade flows.<sup>9</sup> Some are international standards, e.g. issued by international organizations such as the Organisation of Islamic Cooperation (OIC/The Standards and Metrology Institute for Islamic Countries (SMIIC) Halal standard) or regional/intergovernmental organizations such as Association of Southeast Asian Nations (ASEAN) guidelines on Halal food. In addition, certain domestic standards acquired international importance (e.g. The Halal Assurance System (HAS) Indonesia and The Malaysian Standard (MS) Malaysia).

As public Halal regulation at the national level becomes increasingly common, concerns about how trade is affected grow. Halal standards and regulations may create unnecessary obstacles to international trade and discrimination towards import products, and also lack transparency. Trade disputes related to Halal have emerged even among Muslim and Islamic countries, for instance at the regional level within the ASEAN.<sup>10</sup>

In the WTO, the main provisions allowing Members to take domestic Halal measures are the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), and the General Exceptions clause under the General Agreement on Tariffs and Trade (GATT) Article XX. The SPS

<sup>2</sup> Conrad Hackett, Alan Cooperman, and Anna Schiller, ‘The Changing Global Religious Landscape’, Pew Research Center, *The Changing Global Religious Landscape*, 2017, 46. <https://www.pewforum.org/2017/04/05/the-changing-global-religious-landscape/> (visited 9 February 2021).

<sup>3</sup> ResearchandMarkets.com study ‘Halal food market: Global Industry Trends, Share, Size, Growth, Opportunity and Forecast 2019–2024’, <https://www.researchandmarkets.com/reports/4986764/global-halal-food-market-forecasts-from-2020-to> (visited 7 April 2020).

<sup>4</sup> Laura Kurth and Pieter Glasbergen, ‘Serving a Heterogeneous Muslim Identity? Private Governance Arrangements of Halal Food in the Netherlands’, 34 (1) *Agriculture and Human Values* 103–18 (2017), <https://doi.org/10.1007/s10460-016-9698-z>.

<sup>5</sup> Eva Johan, ‘New Challenges in ASEAN Regional Market: International Trade Framework on Halal Standard’, 18 (1) *Jurnal Dinamika Hukum* 93 (2018), <https://doi.org/10.20884/1.jdh.2018.18.1.809>.

<sup>6</sup> [https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Halal\\_Goes\\_Global-web\(1\).pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Halal_Goes_Global-web(1).pdf) at 20. (visited 8 April 2020).

<sup>7</sup> <https://www.fao.org/3/y2770e/y2770e08.htm> (visited 7 January 2022).

<sup>8</sup> [https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252Fmeetings%252FCX-714-43%252FWFD%252Ffile43\\_08e.pdf](https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252Fmeetings%252FCX-714-43%252FWFD%252Ffile43_08e.pdf) (visited 7 January 2022).

<sup>9</sup> Ali Abdallah, Mohammed Abdel Rahem, and Antonella Pasqualone, ‘The Multiplicity of Halal Standards: A Case Study of Application to Slaughterhouses’, 8 (1) *Journal of Ethnic Foods* 7 (2021), <https://doi.org/10.1186/s42779-021-00084-6>.

<sup>10</sup> Issues on Halal certification, Halal standards, and Halal labelling (logo) are considered as trade barriers within ASEAN region. See Matrix of ASEAN cases Non-Tariff Measures/Trade Barriers as of 26 April 2021. <https://asean.org/wp-content/uploads/Matrix-of-Actual-Cases-as-of-26-April-21.pdf> (visited 8 January 2022).

Agreement allows WTO Members to take measures to protect human, animal or plant life, or health.<sup>11</sup> The TBT Agreement stipulates the conditions to adopt general technical measures and regulations.<sup>12</sup> In addition, GATT Article XX contains specific exceptions allowing Members to adopt certain measures justified by important societal values and interests, even if they are inconsistent with other GATT rules—provided that they are not a means of arbitrary and unjustified discrimination or a disguised restriction of trade.

To date, three disputes under the formal WTO Dispute Settlement Body (DSB) saw individual claims related to Halal measures, namely DS484 *Indonesia–Chicken Products*,<sup>13</sup> DS477/DS478 *Indonesia–Horticultural products*,<sup>14</sup> and DS506 *Indonesia–Bovine Meat*.<sup>15</sup> So far, the claims were exclusively resolved based on the GATT provisions, without addressing the consistency of the Halal measures with the SPS or TBT Agreements.<sup>16</sup>

Existing literature discusses Halal measures in WTO law mainly from a doctrinal perspective with reference to the formal disputes of the DSB.<sup>17</sup> Yet formal dispute settlement procedures give only limited insight into the trade concerns arising from Halal regulation in practice. Our research aims to add to the existing literature and enhance the understanding of Halal measures as a trade concern by placing the analysis at the level of the SPS and TBT Committees. We also break the unitary notion of ‘Halal measures’ down into distinct technical rules. To this end, we conduct an empirical analysis of notifications and Specific Trade Concerns (STCs) about national Halal measures in the TBT and SPS Committees. Notifications give an insight into the extent to which WTO Members adopt regulatory measures relating to Halal. Formal trade disputes are only the tip of the iceberg, and STCs, in turn, provide more realistic insights into whether and why domestic Halal measures raise trade concerns.

This approach reflects WTO scholarship that highlights the administrative side of the WTO beyond the formal dispute settlement mechanism<sup>18</sup> and the Committee system as a ‘site of non-judicial governance.’<sup>19</sup> STCs are complementary to the dispute settlement mechanism,<sup>20</sup> they allow Members to acquire higher quality information than notifications, and serve as a general compliance monitoring tool.<sup>21</sup>

For the empirical analysis, we collected data covering 1995 to 2020 from the WTO’s TBT and SPS Information Management System (IMS),<sup>22</sup> using Halal as a search term (notifications)

<sup>11</sup> Article 2.1 SPS Agreement.

<sup>12</sup> Article 2.2 TBT Agreement.

<sup>13</sup> Panel Report, *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769.

<sup>14</sup> Appellate Body Report, *Indonesia—Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017.

<sup>15</sup> Request for Consultations, *Indonesia—Measures Concerning the Importation of Bovine Meat*, WT/DS506, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/506-1.pdf&Open=True> (visited 7 January 2020).

<sup>16</sup> Pablo Barrios, ‘Halal Certification and Labelling Requirements and the TBT Regime: A Case Study of Indonesian Halal Act 33/2014’, 45 (3) *Legal Issues of Economic Integration* 271–87 (2018).

<sup>17</sup> Boris Rigod and Patricia Tovar, ‘Indonesia–Chicken: Tensions between International Trade and Domestic Food Policies’ 18 (2) *World Trade Review* 219–43 (April 2019); Haniff Ahamat and Nasarudin Abdul Rahman, ‘Halal Food, Market Access And Exception to WTO Law: New Aspects Learned From Indonesia - Chicken Products’, 13 (2) *Asian Journal of WTO & International Health Law and Policy* 19 (September 2018); Michelle Limenta, Bayan M. Edis, and Oscar Fernando, ‘Disabling Labelling in Indonesia: Invoking WTO Laws in the Wake of Halal Policy Objectives’, 17 (3) *World Trade Review* 1–26 (July 2017).

<sup>18</sup> Robert Wolfe, *Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life*, WTO Working Papers, 6 March 2013, 2013/03 <https://doi.org/10.30875/1ddcf17f-en>.

<sup>19</sup> A. Lang and J. Scott, ‘The Hidden World of WTO Governance’, 20 (3) *European Journal of International Law* 575–614 (1 August 2009).

<sup>20</sup> Henrik Horn, Petros C. Mavroidis, and Erik Wijkström, ‘In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees’, SSRN Electronic Journal, 2013, <https://doi.org/10.2139/ssrn.2478598>.

<sup>21</sup> Kian Posada, Ganne Emmanuelle, and Piermartini Roberta, ‘The Role of WTO Committees through the Lens of Specific Trade Concerns Raised in the TBT Committee’, WTO Working Papers, vol. 2020/09, WTO Working Papers, 20 May 2020 <https://doi.org/10.30875/94f84595-en>.

<sup>22</sup> IMS database on TBT and SPS measures, <http://tbtims.wto.org/> and <http://spsims.wto.org/>. (visited 7 January 2020).

or document keyword (STCs). After the manual screening, the result was 75 notifications<sup>23</sup> and 13 STCs.<sup>24</sup>

## II. HALAL NOTIFICATIONS UNDER THE TBT AND SPS AGREEMENTS

Notifications about domestic Halal measures provide insights about Halal regulation at the domestic level, notably the level of regulatory activity and the different types of Halal measures and their objectives.

The TBT and SPS Agreements give WTO Members the right to establish technical regulations and sanitary and phytosanitary measures. However, these must be notified to the TBT or SPS Committees<sup>25</sup> unless they are exempted.<sup>26</sup> Members who propose measures should publish a notice to give interested parties time to react,<sup>27</sup> indicating products covered by a proposed measure and a brief description of the objective and rationale,<sup>28</sup> with sixty days to provide comments.<sup>29</sup>

The obligation to notify was developed to facilitate the work of the Committees,<sup>30</sup> and is recognized as an instrument of the transparency principle.<sup>31</sup> Notification procedures can be seen as a gradually emerging culture of transnational SPS governance, involving a regular routine of dialogue, cooperation and critical self-reflection.<sup>32</sup> However, many factors influence compliance with such transparency obligations.<sup>33</sup>

### A. Overview of TBT and SPS Halal notifications by number and country

Since 1995, in twenty-five years, WTO Members have made 75 notifications about domestic Halal-related measures (Figure 1), of which they notified 15% under the SPS Agreement and 85% under the TBT Agreement. They made only two notifications in the initial period between 1995 and 2006, compared to seventy-three between 2007 and 2020, which evidences that there is an increase in public Halal regulation at the domestic level.

17 countries made Halal notifications (Figure 2), commonly Muslim-majority countries. However, only 11 of the 57 Members of the OIC that are also WTO Members notified any measure.<sup>34</sup> This suggests that many Members may not, in fact, notify their Halal regulation.

Notification is a legal obligation under WTO law, but compliance is not enforced by immediate tangible penalties. In fact, as the data show, non-notification is a major reason to file an STC.

<sup>23</sup> The quality of documents provided varies significantly, and were complemented by other sources where possible.

<sup>24</sup> Resulting in 2 data sets (4 documents) for SPS; and 11 data sets (49 documents) for TBT.

<sup>25</sup> Article 2.9 and 5.6 TBT Agreement; Annex B SPS Agreement.

<sup>26</sup> C. Downes, 'The Impact of WTO Transparency Rules: Is the 10,000th SPS Notification a Cause for Celebration?—A Case Study of EU Practice', 15 (2) *Journal of International Economic Law* 503–24 (1 June 2012), <https://doi.org/10.1093/jiel/jgs013>. See Article 2.9 and 5.6 TBT Agreement; Article 7 and Annex B paragraph 5 SPS Agreement.

<sup>27</sup> Article 2.9.1, 5.6.1 TBT Agreement; Annex B 5(a) SPS Agreement.

<sup>28</sup> Article 2.9.2, 5.6.2 TBT Agreement; Annex B 5(b) SPS Agreement.

<sup>29</sup> G/TBT/1/Rev.14, 24 September 2019, section 6.3.1.8., with possibility for 90 days—same applies to Notifications in G/SPS/7/Rev.4 section 2.8.

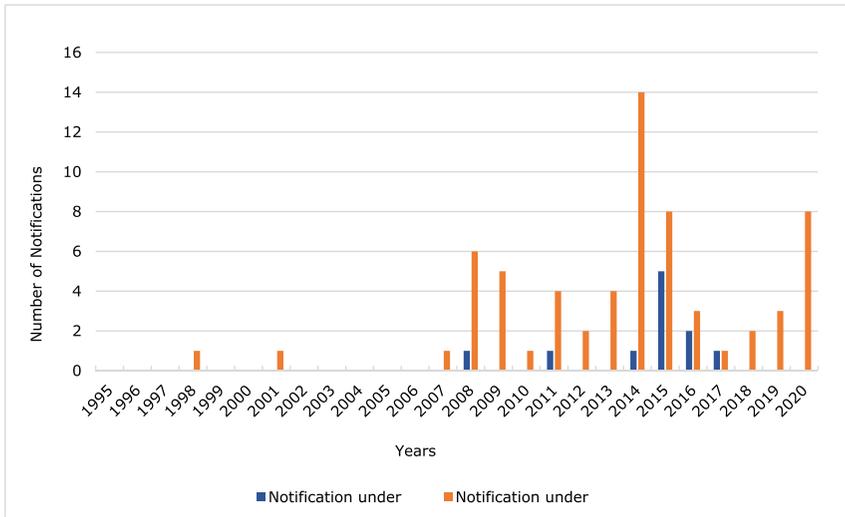
<sup>30</sup> G/TBT/1/Rev.14 Decisions and Recommendations Adopted by The TBT Committee Since 1 January 1995, 24 September 2019; G/SPS/7/Rev.4 Recommended Procedures for Implementing the Transparency Obligations of The SPS Agreement (Article 7), 4 June 2018.

<sup>31</sup> Tim Josling and Klaus Mittenzwei, 'Transparency and Timeliness: The Monitoring of Agricultural Policies in the WTO Using OECD Data', 3 (12) *World Trade Review* 13 (2013).

<sup>32</sup> See Downes, above n 26, at 17.

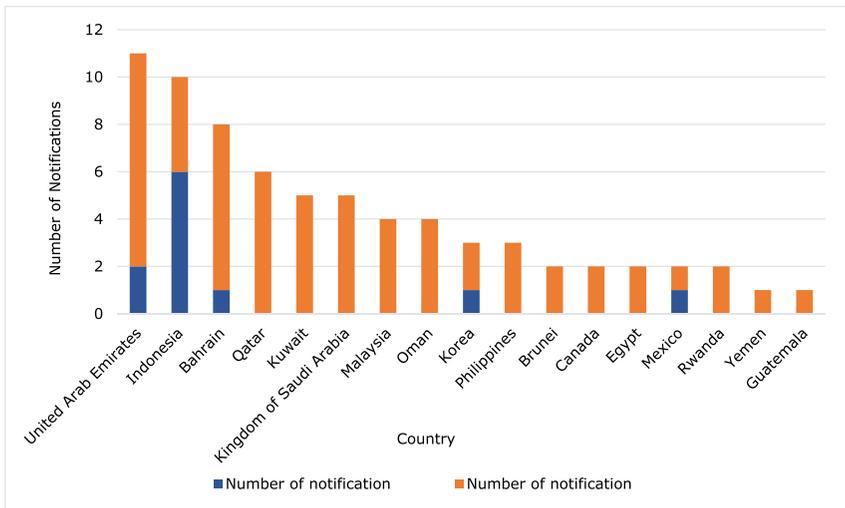
<sup>33</sup> *Ibid.*

<sup>34</sup> <https://www.oic-oci.org/states/?lan=en> (visited 8 April 2020).



**Figure 1.** Number of Halal notifications under the TBT and SPS Agreements.

Source: Authors' calculation from TBT and SPS IMS notifications for Halal measures.



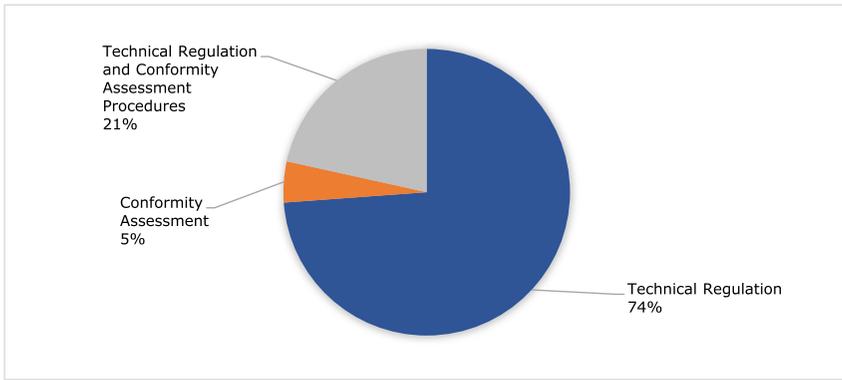
**Figure 2.** Halal notifications by country.

Source: Authors' calculation from TBT and SPS notifications for Halal measures.

### B. TBT Halal notifications by type and objective

Members must notify the TBT Committee about their technical regulations and conformity assessment procedures if the measures do not correspond to international standards and might have a significant effect on trade.<sup>35</sup>

<sup>35</sup> Article 2.9 and Article 5.6 TBT Agreement.



**Figure 3.** Types of Halal measures notified under the TBT Agreement.

Source: Authors' calculations using data from the TBT Committee.

### 1. Type of Halal measures notified

The TBT Agreement distinguishes 'technical regulations' and 'conformity assessment procedures.' 'Technical regulations' are mandatory measures,<sup>36</sup> e.g. mandatory Halal requirements.<sup>37</sup> 'Conformity assessments' are procedures to determine that relevant technical regulations or standards are fulfilled, for example through inspections or accreditations.<sup>38</sup>

Around 95% of all notifications also concern a technical regulation (Figure 3), indicating that almost all notified measures create substantive mandatory Halal requirements.

### 2. Notified objectives of Halal measures

TBT measures must not be more trade-restrictive than necessary to achieve a legitimate objective, such as 'national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology, or intended end-uses of products.'<sup>39</sup> In the notifications, countries have to identify the objectives of their Halal measures.

Our research shows that, commonly, one Halal measure is used to achieve several goals (Figure 4), the most frequently cited objective being the protection of human health and safety, followed by consumer information and labelling, and the prevention of deceptive consumer practices.

## C. SPS Halal notifications by objective and international standard

In contrast to the TBT Agreement, the SPS Agreement is tied to a limited number of permissible objectives. An SPS measure must have the objective to protect humans, animals, and plants from diseases, pests, or contaminants.<sup>40</sup> This restricted scope explains why we identified only 11 SPS Halal notifications.

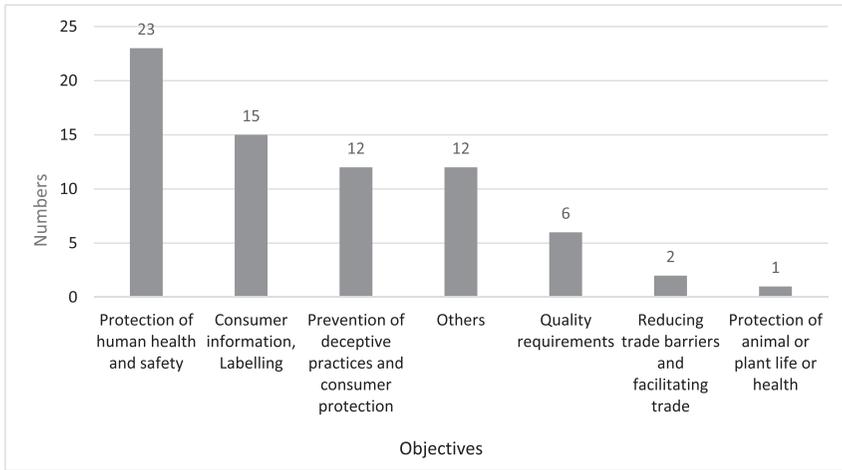
<sup>36</sup> Article 1.1 TBT Agreement.

<sup>37</sup> E.g. G/TBT/N/KWT/13, G/TBT/N/BHR/58, G/TBT/N/BRN/1 etc.

<sup>38</sup> Annex 1.2 TBT Agreement.

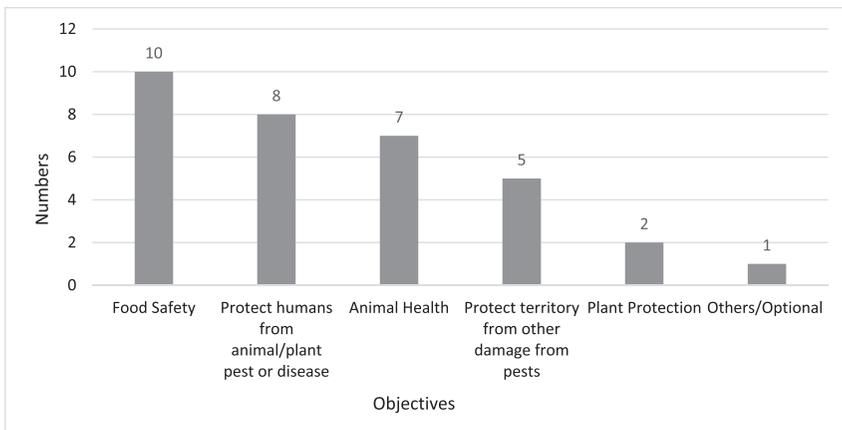
<sup>39</sup> Article 2.2 TBT Agreement.

<sup>40</sup> Article 5 and Annex A SPS.



**Figure 4.** Objective pursued by Halal measures notified under the TBT Agreement.

Source: Authors’ calculations using data from the TBT Committee.



**Figure 5.** Objectives pursued by Halal measures notified under the SPS Agreement.

Source: Authors’ calculation using data from the SPS Committee.

*1. Notified objectives of Halal measures*

The notifications characteristically name a multitude of objectives for a given Halal measure (Figure 5), typically food safety (e.g. shipments of imported food, quarantine requirements), or sanitary, animal and plant health certification.

*2. International standards referenced in the notifications*

Under both the SPS and the TBT Agreements, Members should use international standards when formulating domestic measures.<sup>41</sup> However, the SPS Agreement contains more specific provisions for Members than the TBT Agreement, and therefore SPS notifications also report whether an international standard is regarded as applicable.

<sup>41</sup> Article 2.4 TBT Agreement; Article 3 SPS Agreement.

The SPS Agreement specifically recognizes three international standards, namely the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention.<sup>42</sup> Conformity with international standards results in a presumption of legality. Higher requirements may be introduced only under specific conditions.<sup>43</sup>

Within the Codex Alimentarius Commission, standardization efforts on Halal food have been undertaken, resulting in the General Guidelines CAC/GL 24/1997 for using the term Halal. These guidelines provide a basic understanding of what is Halal and non-Halal and require for instance that when the claim Halal is made, then the word Halal (or its equivalent) must be stated on the label. Under Codex procedures, guidelines are qualified as ‘related texts’ making them arguably more advisory in nature than ‘General Standards.’<sup>44</sup> According to the SPS Committee, whether different Codex instruments unfold a different legal effect depends ‘on its substantive content rather than the category.’<sup>45</sup> In this respect, the Halal Guidelines’ legal authority is weakened by not being entirely uniform. An interpretive note grants a ‘licence to deviate’: it explicitly recognizes the legitimacy of divergent interpretations by different Islamic Schools of Thought and of appropriate authorities of importing countries, and provides the possibility to justify non-acceptance of certificates granted by religious authorities of exporting countries.<sup>46</sup> On this basis, countries deviate from the Halal Guidelines—for instance, they prohibit the processing and storage of both Halal and non-Halal foods in the same facilities, even though this is permissible under the Codex Guidelines after proper cleaning procedures. Further, the Halal Guidelines are non-exhaustive and leave significant gaps with many requirements of Islamic Sharia law.<sup>47</sup>

Next to the Halal Guidelines, various other recognized international standards are incidentally relevant for Halal foods, for instance, the Codex guidelines on inspection, control or accreditation, as well as Office of International des Epizooties (OIE) standards on animal health. Seven of eleven Halal notifications under the SPS Agreement mention a standard of the Codex Alimentarius, and four out of eleven notifications refer to the Codex Halal Guidelines CAC 24/1997. Five out of eleven notifications (also) refer to the OIE standards for measures relating to animal health (Figure 6).

While the Halal Guidelines and several Codex and OIE standards contain requirements relevant to domestic Halal measures, they do not exhaustively cover all aspects of Halal regulation. This absence of a uniform and exhaustive international standard governing halal measures is a key explanation for the legal uncertainty surrounding the WTO’s compliance with domestic halal measures.

### III. SPECIFIC TRADE CONCERNS ABOUT HALAL MEASURES UNDER THE TBT AND SPS AGREEMENTS

STCs are considered more reflective of actual trade problems for non-tariff measures than formal disputes.<sup>48</sup> The STC mechanism is regarded as an arena for interstate dialogue and therefore has a valuable role in mitigating trade disputes. It also functions as a subsidiary monitoring mechanism that captures non-notified measures. Member countries can give responses to and ask for

<sup>42</sup> Article 3.1 and 3.4 SPS Agreement.

<sup>43</sup> Article 2.3 SPS Agreement, i.e. if it is based on scientific evidence and risk assessment has shown that a higher level protection is appropriate.

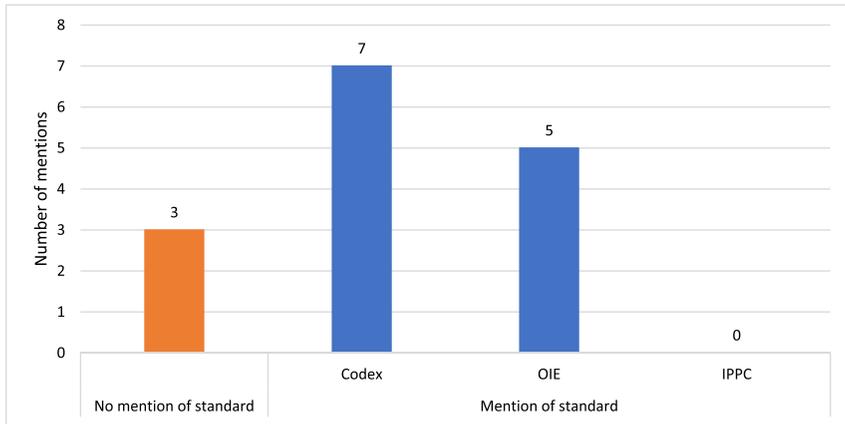
<sup>44</sup> Mariëlle D. Masson-Mathee, *The Codex Alimentarius Commission and Its Standards* (The Hague: T.M.C. Asser Press, 2007), <https://doi.org/10.1007/978-90-6704-515-5>.

<sup>45</sup> See the excellent discussion by Cazzini at 32–6. Francesco Cazzini, ‘Food Trade and Standards in The SPS Agreement: Necessity and Legitimacy in A Cooperation Frame’ (Ph.D. Dissertation on file at Università Degli Studi Di Milano, Italy), [https://air.unimi.it/retrieve/handle/2434/706920/1395571/phd\\_unimi\\_R11592.pdf](https://air.unimi.it/retrieve/handle/2434/706920/1395571/phd_unimi_R11592.pdf) (visited 7 January 2022).

<sup>46</sup> See interpretative note to the Guidelines, above n 7.

<sup>47</sup> See above n 8.

<sup>48</sup> Cosimo Beverelli, Mauro Boffa, and Alexander Keck, ‘Trade Policy Substitution: Theory and Evidence from Specific Trade Concerns’, WTO Staff Working Papers ERSO-2014-18, World Trade Organization (WTO), Economic Research and Statistics Division, 2014, 58 <https://doi.org/doi:10.30875/44470c17-en>.



**Figure 6.** Reference to recognized standards in SPS notifications on Halal measures.

Source: Authors' calculation using data from the SPS Committee.

clarification in respect of other Members' domestic measures through the STC mechanism. As such, the STCs process facilitates other Members to influence proposed measures at the stage of the legislative process of the issuing country.<sup>49</sup>

Wolfe<sup>50</sup> and Horn et al.<sup>51</sup> highlight the importance of the STC mechanism as an informal conflict management mechanism that runs parallel to the formal Dispute Settlement.<sup>52</sup> Cho shows that some SPS issues have been resolved utilizing the SPS Committee's discussion and consultation in the STC mechanism. The STC's 'extra-judicial' peer-review mechanism is widely regarded as a viable avenue for regulatory dialogue on risk science.<sup>53</sup> In it, 'problem-oriented' cultures of rationality are exercised on a professional basis through scientific techniques, based not on negotiations and judicial decision-making but rather on norms established by experts, which are less formal.<sup>54</sup>

The overall number of STCs indicates the extent to which Halal measures are a trade concern under WTO law and among Members. Between 1995 and 2008, WTO Members raised only one STC related to Halal measures, compared to a marked increase of twelve STCs between 2009 and 2020, illustrating that Halal measures have gained more attention at the WTO level. Of these STC, eleven concerned the TBT Agreement, while two were raised under the SPS Agreement.

### A. What kind of trade concerns about Halal measures are raised in TBT STCs?

In our data analysis,<sup>55</sup> we classified what kind of trade concerns were brought forward in the Halal STCs and identified five types of categories. These cover both, substantive (60%) and procedural (40%) issues (see Fig. 7).

Among the substantive concerns, requests for *clarification of Halal certification* are the most common, at issue in eight of eleven STCs, and raised 86 times. The main concerns relate to an

<sup>49</sup> Article 2.5 TBT.

<sup>50</sup> Wolfe, above n 18.

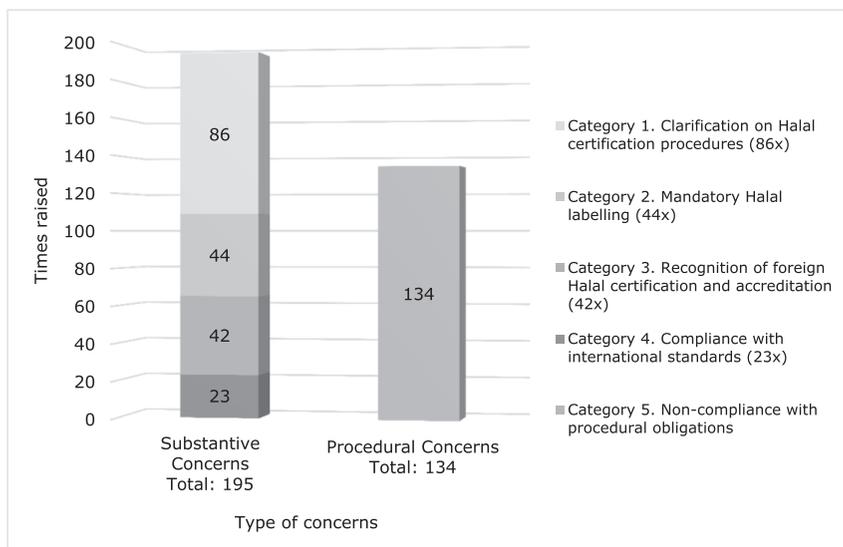
<sup>51</sup> Horn et al., above n 20.

<sup>52</sup> *Ibid.*, at 1.

<sup>53</sup> Cho Sungjoon, 'From Control to Communication: Science, Philosophy, and World Trade Law', 44 (2) Cornell International Law Journal Article 24 (2011), at 273.

<sup>54</sup> Lang and Scott, above n 19 at 611–12.

<sup>55</sup> We analysed the content of the identified TBT STC minutes of meetings, by screening and coding all raised trade concerns.



**Figure 7.** Number and category of Halal trade concerns raised in TBT STCs.

Source: Authors' calculation from TBT Committee's minutes.

unclear implementation of the Halal scheme, e.g. regarding the scope, applicable exemptions, or the definition of Halal.

Another common concern is *mandatory Halal labelling requirements* (5/11 STCs), including concerns as to whether labelling is actually or de facto mandatory; that they create an excess burden on operators, and affect supply and prices. Similarly, the *recognition of foreign Halal certification and accreditation bodies* (4/11 STCs) is problematic, due to unclear recognition processes, limited recognition of certification bodies or re-registration and re-accreditation requirements, as well as difficulties in implementing mandatory Halal certification with a government-to-government model of mutual recognition agreements.

A last common concern is linked to *compliance with international standards* (5/11 STCs), specifically deviations from Codex standards or inefficient use of inspection procedures therein.

Almost half of all trade concerns related to compliance with procedural obligations under the TBT Agreement, most notably non-notifications and the quality of information, as well as a reasonable time to comment, the period between publication and entry into force (7/11 STCs).

### B. Few STCs about Halal measures under the SPS Agreement

In fact, only two STCs that concerned Halal measures were reported under the SPS Agreement.<sup>56</sup> Both were linked to STCs under the TBT, but also fell under the SPS Agreement due to undue delay to access markets and due to unfulfilled sanitary certificate as Halal standard requirement. While it is, therefore, incorrect to state that Halal measures are never SPS measures, so far they have always been linked to TBT-related trade concerns.

<sup>56</sup> IMS ID 286 (IND) and IMS ID 391 (MYS).

## IV. DISCUSSION

We find there are increasing numbers of both, notifications—evidencing domestic regulatory activity about Halal measures—and STCs about Halal measures. National Halal regulation can therefore be regarded as an emergent trade concern.

### A. More national Halal regulation, but likely under-notified

Notifications for Halal measures have gone up significantly, from two between 1995 and 2007 to seventy-five currently, thus corroborating the observation that there is an increase in Halal regulation at the country level. To put this number into perspective: under the TBT and the SPS Agreements, there were in total 46 notifications for organic product measures.<sup>57</sup>

Our data suggest that many Halal measures are not notified: only 11 out of 57 Members of the OIC notified any Halal measure to the WTO, while in the absence of international standards this would generally be required. Non-notification is also a frequent procedural trade concern; 6/11 Halal STCs involved a non-notification plus one that was only partially notified (Table 1).

In the WTO, non-notification is a classical challenge,<sup>58</sup> reportedly in 54% of all STCs.<sup>59</sup> Similarly, Downes's empirical investigation of the European Union's (EU) notification compliance in food safety revealed significant compliance gaps—even for WTO Members with a generally proactive approach.<sup>60</sup> One explanation for non-compliance is that 'adherents to notification commitments may expose themselves to trade disputes,'<sup>61</sup> an explanation that appears to be equally significant for Halal measures. While our findings show that non-notification is an issue, it is not clearly a more urgent issue for sensitive topics such as Halal measures.

### B. STC resolution and the prevention of formal disputes for Halal measures: a mixed success

In twenty-five years, 13 Halal STCs were raised that targeted Halal measures, out of 1.167 total<sup>62</sup> STCs raised in the WTO. To compare the salience, organic measures resulted in a similar number of STC.<sup>63</sup>

The distribution over time of the STC corresponds to the general reported rise in the number of STCs between 2006 and 2017.<sup>64</sup> Their resolution status, however, nuances other empirical evidence about the Committee mechanism, notably the capacity of STCs to resolve trade concerns without formal litigation.<sup>65</sup> Following Horn et al., the STC mechanism is more effective than the DSB.<sup>66</sup> While our findings show some success of the STC mechanism, Halal measures appear at a higher risk of escalating to formal dispute resolution than other areas. Of eleven TBT

<sup>57</sup> There are 26 TBT and 20 SPS notifications between 1995–2020 searching Organic product measures. <http://tbtims.wto.org/en/Notifications/Search?page=1&sortBy=DistributionDate&sortDirection=desc&SearchTerm=organic%20product%20measures&DistributionDateFrom=01%2F01%2F1995&DistributionDateTo=31%2F12%2F2020&DoSearch=True> and <http://spsims.wto.org/en/Notifications/Search?DoSearch=True&NotificationFormats=1&NotificationFormats=7&NotificationFormats=200&NotificationFormats=201&NotificationFormats=202&NotificationFormats=203&NotificationFormats=8&NotificationFormats=9&DistributionDateFrom=01%2F01%2F1995&DistributionDateTo=31%2F12%2F2020&DisplayChildren=true&SearchTerm=organic+product+measures>. (visited 15 September 2021).

<sup>58</sup> Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford: Oxford University Press, 2007) 215.

<sup>59</sup> Posada et al., above n 21, at 7.

<sup>60</sup> Downes, above n 26.

<sup>61</sup> *Ibid.*, at 2.

<sup>62</sup> 505 SPS STC and 662 TBT STC, retrieved from IMS-WTO (1995–2020).

<sup>63</sup> 12 organic measures were discussed as trade concerns (1 SPS, 11 TBT).

<sup>64</sup> Posada et al., above n 21.

<sup>65</sup> *Ibid.*

<sup>66</sup> Horn et al., above n 20.

**Table 1.** Overview of Halal-related TBT STCs

	IMS ID title	N <sup>a</sup>	Raised month and year last raised	Status (Resolved/ongoing/escalated)
502 —	Indonesia-Halal Product Assurance Law 33/2014—comprehensive legal framework covering various aspects	x	15x 28 October 2020	Escalated-Ongoing
643 —	Kingdom of Saudi Arabia, Kingdom of Bahrain, State of Kuwait, Oman, Qatar, Yemen, United Arab Emirates Halal Feedstuff	x	1x 28 October 2020	Ongoing
607 —	Pakistan-Amendment to Pakistan's (Control) Act 1950: Statutory regulatory Order 237 on Labelling, shelf-life, and Halal certification	x	3x 13 May 2020	Ongoing
571 —	Egypt-Halal requirements for Poultry parts and offal	x	3x 20 June 2019	Resolved
461 —	Indonesia-Regulation of the MOA No.2/Permentan/PD.410/1 year 2015 concerning Importation carcass, Meat and/or processed meat products (and its concerning Amendment MoA 58/2015 and MoA 139/2014)	v	5x 15 June 2016	Escalated-Resolved (case: DS 506)
397 —	Indonesia-Regulation of the MOA No.84/Permentan/PD.410/8 year 2013 concerning importation of carcasses (and its concerning Amendment MoA 96/2013 and MoA 101/2013)	x	1x 30 October 2013	Escalated-Resolved (Case: DS 484 and DS 477/478)
402 —	United Arab Emirates-Control regulation, Part I: Halal food	v	1x 30 October 2013	Resolved
317 —	Malaysia-Draft protocol for Halal meat and poultry production	v	4x 13 June 2012	Resolved
253 —	Indonesia-Decree Kep.99/MUI/III/2009 relating to Halal certification	x	4x 24 March 2011	Resolved
256 —	Saudi Arabia, Bahrain, Kuwait-Halal food requirements	v	1x 5 November 2009	Resolved
111 —	United Arab Emirates-Conformity Assessment System and halal certification	x	2x 4 November 2004	Resolved

Source: Authors' analysis based on TBT-STC IMS report.

<sup>a</sup> (X) Halal measures were (V) or were not (X) notified under the TBT notifications mechanism.

Ongoing: STCs that continued to be raised in 2020

Resolved: STCs that did not return in 2020

Escalated: STCs that resulted in a formal dispute of the DSB-WTO

STCs, five ceased to be discussed and can therefore be considered resolved;<sup>67</sup> however, these are also relatively dated. The newer STCs are less clear: three Halal measures are still in consultation at present, 2019 STC may return, and another three STCs escalated, resulting in a formal dispute. Arguably, Halal measures are now more contentious than they were initially.

One STC can be discussed in several formal disputes<sup>68</sup>, and one formal dispute can relate to several STCs consultations.<sup>69</sup> Since three of eleven Halal STCs escalated, the Committee mechanism was often, but not always or consistently effective in preventing a formal dispute. Posada et al. found that almost 90% of the total TBT STCs were ‘resolved’.<sup>70</sup> We found a much lower resolution rate for Halal-related STCs, a strong indication that Halal-related trade concerns have a higher risk of escalating to the formal dispute settlement stage.

Halal measures were raised in three DSB cases, namely DS506, DS484, and DS477/DS478 (joined). Although the Halal measures brought before the DSB had not all been previously subject to a notification in the TBT Committee, all cases were preceded by an STC. Generally, more than half of TBT-related formal disputes are not preceded by an STC.<sup>71</sup> This testifies to the importance of the Committee mechanism in sensitive topics.

The data show that Halal-related STCs have an overall lower likelihood of being resolved, thus underlining that the Committee mechanism is not entirely or generally successful in resolving trade concerns relating to Halal measures.

## V. CONCLUSION

In this article, we have shown national Halal measures to be of growing interest under WTO law. The increase in notifications and STCs demonstrate that Halal regulation has become an increasingly salient topic in international trade, a trend that will predictably continue. International standards could prevent Halal regulation from becoming a trade obstacle. However, consensus about the content of such standards is very difficult to achieve, even at a regional level. While instituting an active transnational regulatory dialogue, compared to other areas, the final success of the STC mechanism in preventing disputes about Halal regulation is limited—thus pointing to the particularly contentious nature of Halal regulation.

Both substantive and procedural trade concerns about Halal measures are common. The major substantive issues for Halal measures are the absence of international standards, how Halal certification operates in practice, the mandatory or voluntary nature of Halal labelling, and how foreign certification bodies should be recognized. Equally, a major concern is Members’ compliance with procedural obligations under the SPS and TBT Agreements.

It is important to distinguish the underlying different trade concerns more carefully, rather than using ‘Halal measures’ as a blanket term. Such nuanced understanding of Halal trade obstacles can lead to technical discussions of Halal measures at the Committee level.

At the doctrinal level, compliance of Halal measures with WTO law will raise fundamental issues of global dimension, notably the intersection between public morality and legitimate interests, religion, and trade. Pragmatically, WTO law may need to prove more accommodative towards ‘exclusive’ international standardization efforts through regional or organizational attempts to formulate international Halal standards—these may prove an important counterbalancing force against the national regulatory fragmentation of Halal.

<sup>67</sup> The TBT Agreement does not classify whether concerns are resolved or not; we use as proxy whether a concern remains on the Committee agenda.

<sup>68</sup> IMS ID 397 was raised in DS484 and DS477/DS478.

<sup>69</sup> DS506 derives from IMS ID 461 and ID 502.

<sup>70</sup> Out of 555 STCs, only 20 entered the formal dispute settlement mechanism, 7 resulting in full-fledged disputes. Posada et al., above n 21.

<sup>71</sup> Posada found that 32/54 TBT disputes were not preceded by an STC. *Ibid.* at 19.