Main Clauses Of U.S. – Indonesia Free Trade Agreement

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ABSTRACT

Bilateral FTA is not a major element of Indonesia's trade diplomacy and policy. Indonesia prefers to promote FTA through ASEAN Free Trade Agreement (AFTA). Nowadays, Indonesia begins to consider more seriously the role of bilateral FTAs, especially with industrial countries. Concluding FTA with advance industrial countries, such as the U.S., will greatly influence Indonesia's economic and legal reform agenda. Even though a US – Indonesia FTA will not happen in the near future, however,the current economic relationship between both countries might pave the way for a closer relationship in the years to come. However, there are several e issues that need to be addressed before both countries conclude the FTA. The issues are: (a) Whether it is possible forIndonesia to engage in a free trade agreement with the U.S.; (b) what obstacles might be faced by both countries in implementing the FTA; (c) what kind of provisions should be designed to minimize the problems. The study shows that the US – Indonesia FTA has a prospect to be concluded because of the benefits gained by both countries. However, there are significant problems in implementing it. The problems mainly arise in agriculture, investment, and IPRs issues. The problems will still remain, unless Indonesia continues to strengthen its legal system and enforcement, encourage transparency, improve facilities, and seriously deal with the corruption issues. Conversely, the US also needs to lower its trade liberalization standards and provide some exceptions in relation to public interest..

ABSTRAK

FTA bukanlah ciri penting dalam polisi dan diplomasi perdagangan Indonesia. Indonesia lebih fokus kepada FTA melalui kerangka ASEAN (AFTA). Namun kini, Indonesia mulai mempertimbangkan dengan lebih serius peranan FTA secara bilateral, terutama dengan negara-negara yang sudah maju. Melaksanakan FTA dengan negara yang lebih maju seperti Amerika Syarikat (USA), akan memberikan pengaruh yang sangat besar terhadap agenda perubahan ekonomi dan undang-undang Indonesia. Walaupun FTA USA – Indonesia tidak akan dilaksanakan dalam waktu terdekat,namun, perhubungan ekonomi semasa antara kedua negara memungkinkan FTA di masa hadapan. Namun demikian, terdapat beberapa masalah yang harus dtangani sebelum FTA dilaksanakan oleh kedua negara. Isu-Isunya

adalah: (a) apakah mungkin bagi Indonesia melaksanakan FTA dengan USA; (b) apakah masalah yang bakal dihadapi oelh kedua negara jika FTA dilaksanakan; (c) bagaimana bentuk perjanjian yang harus dirancang untuk mengurangkan masalah ini. Dapatan menunjukkan bahawa terdapat peluang untuk melaksanakan FTA antara Indonesia dengan USA kerana keuntungan yang boleh diraih oleh kedua belah pihak. Namun akan ada beberapa masalah dalam pelaksanaannya. terutama dalam bidang pertanian, pelaburan, dan harta intelek (IPRs). Masalah ini akan dapat dihindari sekiranya Indonesia berusaha memperkuat sistem perundangan dan pelaksanaanya, menggalakkan transparensi, memperbaiki fasiliti, dan menangani masalah korupsi dengan lebih serius. Sebaliknya pula, USA juga seharusnya menurunkan standard liberalisasi perdagangan dan memberikan beberapa pengecualian berkaitan dengan kepentingan awam.

INTRODUCTION

The World Trade Organization (WTO) Ministerial Conference at Cancun in September 2003 was an important point in the negotiations towards the realization of the Doha Development Agenda.[1] The issue of agriculture subsidies was of primary importance on the Cancun agenda because developing producer countries, represented by the Group of 21,[2] were upset by generous subsidies which developed states, particularly Japan, France and the United States were giving in the form of tax relief or import taxes. The subsidies distort demand both in the importing country as well as in the producing country.[3]

Basically, free trade agreements should not exist in such a multilateral trading system, as they potentially create preferential bilateral or regional markets that disrupt the process of trade. This could cause trade that would normally flow to other countries to flow between the countries benefiting from the preferential treatment.[4] However, Chow notes that the failure of the multilateral discussion at Cancun has led to such free trade agreements being used as convenient political substitutes to WTO multilateral negotiations in foreign trade policy.

Free trade agreements have numerous advantages. Apart from diplomatic and national security benefits and the creation of positive public relations with potential investors, they allow countries to liberalize their economies in a faster way.[5] They encourage foreign direct investment and also expose local industries to a limited

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[1] Margaret Liang, *The Real politic of Multilateral Trade Negotiations from Uruguay to the Doha Round,* Singapore Year Book of International Law, 2004, pg. 1.

[2] An alliance of southern nations led by Brazil, India, China, and South Africa.

[3] Michael Ewing-Chow, *Southeast Asia and Free Trade Agreements: WTO Plus or Bust?* Singapore Year Book of International Law ,2004, pg. 194.

[4] One example is that when the United States reduced or eliminated tariffs on exports from Peru, Ecuador and Bolivia in the 1991 Andean Free Trade Pact, demand for canned tuna from the Philippines, Indonesia and Thailand fell in favor of tuna from Ecuador.

[5] S. Laird, Regional Trade Agreements: Dangerous Liaisons? (1999) *The World Economy, vol. 22, 1183.*

degree of foreign competition, allowing them to prepare for greater competition at the regional and multilateral levels.[6]

Bilateral free trade agreements are not a major element of Indonesia's trade diplomacy and policy. Indonesia was used to promoting bilateral trade relations through efforts other than forming free trade agreements (FTAs).[7] Nowadays, Indonesia has begun to contemplate more seriously the role of bilateral FTAs in promoting trade and economic cooperation with a number of countries. There are two groups of countries which could possibly be FTA partners with Indonesia; a group of developing countries and a group of advanced industrial countries. Concluding a free trade agreement with advanced industrial countries, such as Japan and the United States, would be more difficult than with other developing countries because such an agreement would have a great effect on Indonesia's economic and legal reform agenda.[8]

Even though the U.S. – Indonesia FTA might not happen soon; the current economic relationship between these countries could lead to a closer relationship in the future. However, there are some issues that should be analyzed because some problems might arise as a result of the FTA's implementation. The problems may occur due to several factors, such as a lack of legal enforcement, corruption, trade barrier, economic policy and political risk. Potential risks and problems of implementation of the FTA and possible solutions will be the main issues in this paper. The first part will briefly examine current trade relations and issues between Indonesia and the United States. The second part will address some possible risks and how to design provisions to minimize these problems. The third part will conclude the discussion of the issues and give some recommendations for the successful negotiation on the U.S.-Indonesia FTA.

CURRENT ISSUES OF U.S. – INDONESIA TRADE RELATIONS

The United States has already had free trade pacts with some of Indonesia's neighbors including Australia[9] and Singapore.[10] Also, negotiations are ongoing for an FTA with

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[6] Aravind Das Naidu, *Free Trade Agreements, Blackholes within the WTO?* (Faculty of Law, the National University of Singapore, 2002, pg.17.

[7] Hadi Socsastra, *Towards a U.S.-Indonesia Free Trade Agreement,* CSIS Economics Working Paper Series, May 2004, pg..3.

[8] However, negotiators representing Indonesia and Japan will hold a meeting in Tokyo later this month to finalize an economic partnership agreement (EPA) between the two countries. Since President Susilo Bambang Yudhoyono and Japanese Prime Minister Shinzo Abe agreed on key elements of the EPA, nine chapters have been finalized so far, leaving chapters on energy and mineral resources, trade in goods, rule of origin and technical cooperation still on the negotiating table. *See,* Andi Haswidi, the Jakarta Post, "R.I.-Japan to meet in Tokyo on February 2007 to finalize EPA deal." Feb 9, 2007.

[9] The US-Australia Free Trade Agreement was signed on 18 May 2004 and came into effect on 1 January 2005. It's a comprehensive agreement, with chapters on: Market access for goods, agriculture, pharmaceuticals, cross-border services, financial services, electronic commerce, investment, intellectual property rights, government procurement, competition policy, labor, environment and dispute settlement.

[10] The U.S.–Singapore FTA was signed by President Bush and then Prime Minister Goh on May 6, 2003, and entered into force on January 1, 2004. The Agreement was the first comprehensive U.S. FTA with an Asian nation.

Malaysia[11] and Thailand.[12] According to a U.S. official at the third round of negotiations in November 2006, the United States hopes to conclude these negotiations by early 2007.

Trade and economic relations between Indonesia and the United States have been unbalanced in the sense that the United States is much more important to Indonesia than is Indonesia to the United States. The latest statistics put the United States as Indonesia's second export destination with 13.9% of its total exports.[13] Indonesia has had a trade and investment framework agreement (TIFA) with the United States since 1996, yet deepening the economic partnership was suspended following the 1997 East Asian financial crisis, which hit Indonesia especially hard. Since then, Indonesia has been recovering, while bilateral negotiations have picked up new momentum. Over the past two years, the two countries have held five official TIFA meetings.

However, the economic arguments for an FTA between Indonesia and the United States are quite clear now. The United States is the second most important market for Indonesia's exports, and Indonesia is a potentially huge export market for U.S. businesses.[14] Using econometric modeling, Hufbauer predicts that two-way trade between the US and Indonesia will increase 35%, with U.S. exports increasing by 25% and Indonesian exports increasing by 45%. U.S. export growth to Indonesia would be led by the export of services and established manufactured goods like chemicals, machinery and equipment. Indonesia to U.S. export growth would focus on textiles, clothing and footwear. Hufbauer's models do not suggest increased agricultural trade, once rice and sugar are excluded.

In February 2007, at a conference held in Washington D.C. entitled "Making the Case for a US-Indonesia FTA," David Katz said that an investment accord with Indonesia is among Washington's top priorities in Southeast Asia in 2007.[15] He also said that they are currently exploring a bilateral investment treaty, which is effectively the investment chapter of a FTA.

Based on a study by the Washington-based Peterson Institute for International Economics, an FTA between the two countries could increase trade by about 40%.[16] The study said that a free trade agreement between Indonesia and the United States is fundamentally about large political gains for the United States and

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[11] This FTA would be the third the U.S. is negotiating in the Southeast Asia region. Having signed a Trade and Investment Framework Agreement (TIFA) on 10 May 2004, the US and Malaysia agreed in early 2006 to start negotiating a bilateral Free Trade Agreement. US negotiators have indicated that they expect to conclude talks by the end of 2006 but after five rounds of inconclusive negotiations, and with the March deadline imposed by the US looming large, nothing seems certain.

[12] The US and Thailand started negotiations on a comprehensive bilateral free trade agreement in June 2004.

[13] *Oxford Business Group, "U.S. Interest: Indonesia." vol. 32, 01/29/2007,* (noting that the number one position goes to Japan with 22.3% of Indonesian exports and the United States is followed by China with 9.1% of total.) pg. 29.

[14] David Katz & Gary Clyde Hufbauer, Toward a U.S.-Indonesia Free Trade Agreement, discussed at a conference held in Washington DC entitled "Making the Case for a US-Indonesia FTA," available at www.usindo.org/Briefs/2007/US-Indonesia FTA 01-18-07.htm. (noting that continued growth in Indonesia could lead to greater demand for U.S. consumer goods, capital goods and services.

[15] Oxford Business Group, supra note 13, pg. 29.

[16] Katz, supra note 14.

potentially large economic gains for Indonesia.[17] The study added that Indonesia has relatively low average tariffs and a fairly open investment regime by regional standards, but important barriers remain in place, with peak tariffs and import licenses protecting sensitive commodities.[18] Foreign investment and service providers are limited by regulatory barriers and weak intellectual property rights (IPR).[19]

The United States.-Indonesia FTA will also have significant benefits for Foreign Direct Investment (FDI).[20] President Susilo Bambang Yudhoyono said on the occasion of the Independence Anniversary in 2006 that investment is a key strategy for Indonesia's economic growth and he expected growth in 2007 to be 6.7%.[21]

There are however some significant issues in U.S.-Indonesia FTA that have to be resolved, including the high U.S. tariff on textiles and clothing, high Indonesian tariffs on certain manufactured products, as well on agricultural tariffs and subsidies on both sides. Non tariff barriers (NTB), liberalizing services, protection of intellectual property rights and labor and environmental standards will be other significant issues in any U.S.-Indonesia FTA negotiations.

Moreover, David Katz of the Southeast Asia office of the U.S. Trade Representative (USTR) noted that a US-Indonesia FTA should be considered in the context of the WTO globally, the ASEAN level regionally, and their bilateral relationship. In the global context, Katz argued that an FTA with Indonesia would not conflict with the WTO. The U.S. has been encouraging the Government of Indonesia to be proactive in the current Doha Round trade talks. The level of commitment shown by the Government of Indonesia indicates their level of commitment towards regional and bilateral agreements.

Along with political gains that the U.S. would receive because Indonesia is the country with the largest number of Muslims, the U.S. would also receive significant economic growth gains for the US regarding Indonesia as an important player in Association of South East Asian Nations (ASEAN). Due to the fact that economic growth in Asia is increasing significantly[22], specifically in China and India, the US should consider expanding its relationship with other Asian countries. If it does not, most of the developing countries in Asia will strengthen their economic relationships with China and India, instead.

The FTA might be an alternative way to strengthen the economic relationship between the U.S. and Indonesia. The FTA would also allow both countries to increase their exports and, particularly for Indonesia, this could improve domestic productivity, promote investment, and foster reforms. However, problems

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[17] Noting that politics dominates any discussion of free trade agreements.

[18] In the Indonesian context, pharmaceuticals, educational materials, and copyright are particularly sensitive areas.

[19] The U.S. remains concerned about pirated products and the weak response of Indonesian authorities.

[20] Noting that many investors worry about red tape, the unpredictable legal system, and the difficulty of enforcing property and contract rights.

[21] Tokoh Indonesia, http://www.tokohindonesia.com/ ensiklopedi/s/susilo-b-yudhoyono/pidato/kenegaraan_2006.shtml.

[22] In December 2006 Asia's GDP growth was from 7.4 percent to 7.9 percent. See, Kheng Siang Ng. & Nigel Foo, Asia Economic and Bond Outlook for Q1 2007. available at http://www.ssga.com/library/mkcm/Asia_Economic_Bond_Outlook_Q1_2007_KS_Ng_N_Foo_12.8.06rev2CCRI1167852789.pdf.

still remain in implementing the US – Indonesia FTA. Before both countries consider an FTA as a way of economic liberalization, it is important to discuss the benefits and problems, which might result from the FTA and to find ways to minimize the problems. By analyzing all the strengths, weaknesses, opportunities, and threats the FTA might engender, then the parties can better decide whether they really need an FTA or not.

MAIN PROVISIONS OF A U.S. – INDONESIA FREE TRADE AGREEMENT

The United States has seen bilateral and regional trade talks as a very important strategic opportunity to demand greater trade commitments from its trade partners.[23] Free trade agreements with the United States are wide in scope covering various issues, including trade, service, investment, government procurement, environmental and labor rules, and intellectual property rights (IPRs). To enlarge access to its export market, the U.S. generally demands the reduction and elimination of duties and other non-tariff barriers in those countries. Although most of the issues could create some problems, the main problems will come from three main areas; agriculture, investment, and intellectual property rights.

Based on previous US-FTAs, free trade agreements have come to follow the pattern set by the General Agreement on Tariffs and Trade (GATT), North American Free Trade Agreement (NAFTA) and have incorporated an investment regime within their provisions.[24] Combining trade and investment regimes in one agreement is referred to as an Economic Partnership Agreement (EPA).[25]

In order to design and formulate a free trade agreement with the United States, Indonesia does not have to start from zero. With respect to all matters constitute in GATT, it can be drawn based on prior US-FTAs or US-FTAs that the U.S. proposes to sign. U.S.-Singapore FTA, U.S.-Chile FTA and U.S.-Jordan FTA, or U.S.-Morocco FTA could be alternative models for Indonesia.[26] It is possible that Thailand and Malaysia, which are currently negotiating their FTAs with the United States will provide better models for Indonesia than other U.S. FTAs. Adjustments would, of course, need to be made since the structure, nature and level of development of each of these countries' economies are unique, particularly in agriculture, investment and intellectual property rights areas.

Minimum Standard of Treatment

Minimum standard of treatment is a main principle in international economic law. This principle has become a general international customary law. It affirms that a

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[23] Jakkrit Kuanpoth, Negotiation toward a free trade area: U.S. demands for greater IPR privileges, available at http://www.grain.org/rights/tripsplus.cfm?id=23.

[24] George S. Akpan, The Innovations of the Investment Provisions of the U.S.-*Singapore Free Trade Agreement. Transnational Dispute Management, vol. 2, Issue #05, Nov 2005, 1*

[25] [hereinafter EPA]

[26] United States – Singapore Free Trade Agreement, May 6, 2003, 42 I.L.M. 1026 (2003) art. 15.5 [hereinafter US-SFTA]; United States - Chile Free Trade Agreement, June 6, 2003, 42 I.L.M. 1026 (2003) art. 10.4 [hereinafter US-CFTA]; proposed U.S.-Thailand Free Trade Agreement, Investment chapter, art. 5 [hereinafter proposed US-TFTA]; North America Free Trade Agreement, US-Can.-Mex., Dec 17, 1992, 32 I.L.M. 289 (1993) art. 1105 [hereinafter NAFTA].

state has obligation to assure of protection to a foreign merchant and his property. Nowadays, the minimum standard is playing an important part in international treaty or bilateral investment treaty and becomes a general international customary law. It is not only applied to a foreign merchant, but also to a foreign country.

Indonesia should pay more attention for a *Minimum Standard of Treatment* clause. It is better for Indonesia to review U.S.-Singapore FTA (US-SFTA), U.S.-Chile FTA (US-CFTA), or proposed U.S.-Thailand FTA (US-TFTA), rather than NAFTA provision. The NAFTA provision specifies that [*...each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security*].[27] [*...each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife]*.[28]

While NAFTA provides treatment in accordance with international law, the FTAs mentioned above must put forward that the treatment be in accordance with customary international law.[29] The FTAs provisions specify that the concept of 'fair and equitable treatment' and 'full protection and security' do not require a higher standard than that provided for by customary international law.[30] The fair and equitable treatment obligation only refers to the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process known to the world's major legal systems.[31] Full protection and security contemplates the level of police protection required under customary international law.[32] In this case, Indonesia should adopt the later provision that clarifies the position of the law with respect to a minimum standard of treatment because it is more liberal and does not require a higher standard.

National Treatment and Most Favored Nation Treatment

A National Treatment clause is a provision contained in some treaties, commonly commercial ones, according to foreigners the same rights, in certain respects, as those accorded to nationals.[33] In terms of an international trade context, the principle of national treatment prevents discrimination against foreign products once they have

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[27] NAFTA, Article 1105 (1)

[28] Id. Article 1105 (2)

[29] Akpan, supra note 24, pg. 8.

[30] US-SFTA, supra not 26, art. 15.5 (1-2); US-CFTA, art. 10.4 (1-2); *[1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights].*

[31] US-SFTA, Art. 15.5 (2)(a); US-CFTA, art. 10.4 (2)(a). *[.. "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world];*

[32] US-SFTA, Art. 15.5 (2)(b); US-CFTA, art. 10.4 (2)(b). *[..."full protection and security" requires each Party to provide the level of police protection required under customary international law]*

[33] Black's Law Dictionary (8th ed. 2004)

entered the domestic market.[34] Based on Article III of GATT concerning national treatment, the contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal qualitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

In addition to national treatment clause, *the Most Favored Nation* clause provides that each country will treat the others as well as it treats any other nation that is given preferential treatment.[35] Article I of GATT concerning Most-Favoured-Nation treatment states that with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payment for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

A good international trade treaty should contain a provision on the twin pillars of national treatment and most favored nation treatment.[36] It is clear that all of U.S. FTAs contain the twin pillar clause, both in their market access for goods section and investment section.[37] On the market access for goods article, the national treatment clause is based on Article III of GATT 1994, including its interpretive notes, and to this end Article III of the GATT 1994 and its interpretative notes are incorporated into and made part of the agreement, *mutatis mutandis*.[38] This provision may help to avoid possible disputes between Indonesia and the United States in the future.[39]

However, the implementation of these clauses may create problems, especially for Indonesia. Indonesia has faced complaints filed by the US, Japan, and European Communities.[40] The 1996 National Car Program by the Government of

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[34] Noting that excise duties and value added tax must apply equally to imported and domestic products.
[35] Black's Law Dictionary (8th ed. 2004)
[36] Akpan, supra note 24, pg 6.
[37] Reviewed from all of U.S. bilateral Free Trade Agreements and North America Free Trade Agreement text.
[38] Black's Law Dictionary (8th ed. 2004) [Latin] All necessary changes having been made; with the necessary changes <what was said regarding the first agreement applies *mutatis mutandis* to all later ones>
[39] Indonesia Autos Case – Certain Measures Affecting the Automotive Industry. Complaints by the European Communities (WT/DS54), Japan (WT/DS55 and WT/DS64), and the United States (WT/DS59).
[40] See Indonesia Autos Case, DS54, DS55, DS59, and DS64 of the WTO Cases.

Indonesia provided various benefits such as luxury tax exemption or import duty exemption for qualifying cars or Indonesian car companies. The complainants alleged that Indonesia violated GATT provisions Article III and Article I. This case should be considered to avoid possible risks or similar cases in the future.

Due to the fact that all of US-FTAs contain the same provisions for national treatment and most favored nation treatment, it seems that a possible U.S.-Indonesia FTA will need to apply the same provision with minor possible changes. In addition, the parties should pay more attention to balancing national interest and commitment to the treaties or agreements. As Indonesia and the US are members of the WTO, it tends to be easier to deal with this problem.

Safeguard Measures

Safeguards will be important elements in a U.S.-Indonesia FTA because they could give assurance and provide some level of comfort when following further liberalization. This provision may be addressed as described under the WTO Safeguard Agreement as the application of Article XIX of GATT 1994.[41] However, in determining that an increase in imports has caused, or is threatening to cause, serious injury to Indonesian industries or U.S. industries, the authorized government body has to evaluate all relevant factors of an objective and reliable nature.[42]

Concerning U.S.-Indonesia FTA safeguard measure provisions, both parties could negotiate to permit either party to exclude the other party from such measures. The sensitive issue in this provision will be textiles and apparel, and agricultural safeguard measures. Regardless, since the implementation of the Uruguay Round Agreements, Indonesia has never used the special safeguard but still a specific article or annex is needed which explicitly states textiles and apparel, pharmaceutical and agricultural safeguard measures. This condition should be considered to delay and give some exceptions to the safeguard measurement because Indonesia has to prepare its economic sectors and human resources from new challenges, opportunities, and threat. However, there would be contrary to the national treatment and most favored nation treatment. The parties should carefully discuss this provision in order to prevent a bigger problem in the future.

Rules of Origin

Rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going

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[41] Article XIX of the General Agreement of GATT 1994 and WTO Agreement on Safeguard Art. 4 (2a) *[...In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment]*., (noting that Indonesia ratified Article XIX of GATT 1994 (WTO Safeguards Agreement) in order to protect its domestic markets against an increase in imports.)

[42] Harry T. Prabawa, *"Indonesia Safeguards against Import,"* The Jakarta Post, May 30, 2005.

beyond the application of paragraph 1 of Article I of GATT 1994.[43] Rules of origin are important because the preferential treatment provided for in a free trade agreement is usually granted only to products originating from members of that FTA.[44] In particular, there are concerns that goods processed partly or fully in a third country can get duty-free access under a bilateral agreement by being re-exported with just enough processing to satisfy rules of origin requirements.[45] This becomes complicated by the fact that there are illegal transshipment problems that arise when one country as a transit point.[46]

In order to prevent further problems, U.S.-Indonesia FTA should keep the rules of origin provision as simple as possible and as liberal as possible. As the importer, Indonesia needs to have national regulation concerning rules of origin that accord with Uruguay Round. Indonesia also should get involved in WTO Committee, Technical Committee, or Custom Cooperation Council (CCC) to harmonize the national rules of origin. Transparency is the most important part in implying the provision because Indonesia does not have the capability to deal with complicated methods.

From the Indonesian side, the US-SFTA may be a good model for a rule of origin provision for US-Indonesia FTA because it tends to be more liberal.[47] However, to make the FTA effective, the government should ensure necessary domestic reforms such as administrative and legal reforms, along with reforms at the level of state government.[48] In addition, the U.S. and Indonesia have signed an agreement to prevent illegal transshipment of textiles and apparels, which makes it easier for both countries to deal with rules of origin matters.

Customs Administration

Customs Administration is an area in which Indonesia needs a great deal of capacity building, facilitation and cooperation. In order to facilitate greater trade and encourage economic growth in both countries, on November 17, 2006, the U.S. and Indonesia signed a Memorandum of Understanding (MOU) between U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement and Indonesian

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[43] WTO Agreement on Rules of Origin, Art. 1 para 1 (noting that a decision by a customs authority on origin can determine whether a shipment falls within a quota limitation qualifies for a tariff preference or is affected by an anti-dumping duty. These rules can vary from country to country.)

[44] Emphasize that these are the criteria which determine the national origin of a product. The country of origin of a product is usually seen as the country where the last substantial transformation took place.

[45] The Statesman, "Government must not Relent on Rules of Origin," India, 18 July 2005. available at http://www.bilaterals.org/article.php3?id_article=2312

[46] Embassy of the United States Jakarta, "Recent Economic Reports, Indonesia: Trade and Investment Highlights",
December 2006, available online at http://jakarta.usembassy.gov/econ/trade-invest_dec06.html. (noting that the Ministry of Trade needs to strengthen implementation of the regulations since transshipments of goods through Indonesia continues to flourish. There are companies from some countries, including China, use Indonesia to transship their exports and avoid U.S. and the European Union trade restrictions.)

[47] Read US-SFTA, supra note 26, Chapter 3: Rules of Origin, art. 3.1-3.20

[48] Ministry of Trade (MOT) Director General for International Trade Diah Maulida has issued Director General for International Trade Regulation No. 4/2005 on October 7, 2005 limiting the issuance of Indonesian Certificates of Origin (COOs) for sensitive items like shrimp, textiles, garments and footwear to just 14 of 85 provincial offices.

Customs and Excise.[49] The MOU establishes a framework for giving to customs technical assistance, information sharing, and law enforcement cooperation in order to facilitate greater trade and prevent transshipments and other customs crimes.
At this point, there will be potential risks as Indonesia faces corruption issues, lack of transparency and unfair competition. In order to minimize these risks, both parties have to make sure that administrative rulings are be made public and have an expansive section on customs cooperation, as provided under Article X of GATT 1994.[50] Article X states that [*...laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.]* Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party shall also be published. However, this provision shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

As the US-SFTA applies the provisions of the Agreement on Implementation of Article X of GATT in Chapter 4 Article 4.1., it is a good idea for Indonesia to follow this system. The US-SFTA Article 4.1. specifies that *[...each Party shall ensure that its laws, regulations, guidelines, procedures, and administrative rulings governing customs matters are promptly published, either on the Internet or in print form]. [...Each Party also shall designate, establish, and maintain one or more inquiry points to address inquiries from interested persons pertaining to customs matters, and shall make available on the Internet information concerning procedures for making such inquiries].*

As a basis for negotiating Customs Mutual Assistance arrangements with other foreign administrations, U.S. Customs and Border Protection has used the Customs Cooperation Council (CCC) model since joining the World Customs Organization in 1970.[51] This model allows domestic and foreign courts to recognize each arrangement as a legal basis for wide ranging cooperation.[52] These arrangements lead to the exchange of information and documents that will ultimately assist

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[49] Fact Sheet: U.S. and Indonesia Sign Customs Mutual Assistance Memorandum of Understanding, available online at http://www.usembassyjakarta.org/factsheets/

[50] Agreement on Implementation of Article X of GATT 1994

[51] In June 1967, the Customs Cooperation Council (CCC), informally known as the World Customs Organization (WCO), adopted a model bilateral convention on mutual administrative assistance for countries to implement as part of a national customs policy.

[52] Noting that such a framework is vital because of explosive growth in the volume and complexity of international trade. Great demands are being placed on customs administrations around the world. With government resources not able to keep pace with this growing trade, customs administrations rely on mutual assistance as a powerful investigative tool.

countries in the prevention and investigation of customs offenses.[53] It might be hard for Indonesia to fulfill the task considering the expenses and human resources, but if the government of Indonesia has the intention to minimize the risks, then this kind of provision is desirable.

The textiles and apparel provision will be one of the most important issues in the U.S.-Indonesia FTA. Textiles and apparel form an important sector for Indonesia and are major export items from Indonesia to the United States.[54] This is also an industry that is regarded as sensitive by the United States.[55] Currently, Indonesia's textile and apparel producers are confronted with a surge of illegal imports from China.[56] Corruption is the main reason behind the rising share in foreign products on Indonesia's domestic market.[57] This condition may lead to illegal transshipment of textiles and apparel through Indonesia to the United States.

In order to prevent illegal transshipment and establishes a formal mechanism to help safeguard legitimate textile trade, U.S. Trade Representative Susan C. Schwab and Indonesia's Trade Minister Mari Pangestu have signed a Memorandum of Understanding (MOU) on cooperation to prevent illegal transshipment of textiles and apparel through Indonesia to the United States.[58] Furthermore, Ministry of Trade Director General for International Trade, Diah Maulida, announced on January 15, 2007 that the Government of Indonesia may abolish Decree No. 732/2002 concerning Textile Import Arrangements.[59] The regulation, according to Maulida, lacks a legal basis and is often the source of criticism from other members of the World Trade Organization (WTO).[60]

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[53] Emphasize that they are particularly helpful for the Attaché offices, and each arrangement is tailored to the capacities and national policy of an individual country's customs administration. The United States has entered into Customs Mutual Assistance arrangements with 58 customs administrations.

[54] Central Statistic Agency, available at http://www.bps.go.id/index.shtml.
Based on Central Statistic Agency (BPS) and Indonesian Ministry of Industry data, the textile and garment industry is one of Indonesia's largest foreign exchange earners, contributing $8.6 billion in exports in 2005, 14.9 percent of total non-oil and gas exports and approximately three percent of Gross Domestic

[55] Noting that in 2005, textile and apparel imports from Indonesia were valued at $3 billion, making Indonesia the United States' fifth largest textile and apparel supplier in terms of value.)

[56] "Corruption behind the lack of control at customs: Indonesia's textile devastated by illegal imports from China (Country Report 2)", October 10, 2006, [online] available at http://www.emergingtextiles.com/?q=art&s=061010Indo1&r=free&n=1.

[57] It is publicly known that the condition will be hard to be handled, as Chinese exporters are notoriously inventive and Indonesian customs are notoriously corrupt.

[58] Office of the United States Trade Representative, "United States and Indonesia Sign Agreement to Prevent Illegal Transshipment of Textiles and Apparel, Sep. 26, 2006, available online at http://www.ustr.gov/Document_Library/Press_Releases/2006/September/United_States_Indonesia_Sign_Agreement_to_Prevent_Illegal_Transshipments_of_Textiles_Apparel.html

[59] Embassy of the United States Jakarta, "Recent Economic Reports, Indonesia: Trade and Investment Highlights",
January 2007, available online at http://jakarta.usembassy.gov/econ/trade-invest_jan07.html

[60] Under the Decree, only companies that have production facilities that use imported fabrics as inputs for finished products, such as garments or furniture, may obtain textile import licenses. The GOI has often noted that the Decree is designed to curb smuggling, but an increasing gap between GOI import statistics for fabrics and partner country exports figures for those same items indicate that smuggling remains prevalent.

Concerning Indonesia as a transshipment center, the US-Indonesia FTA should be more restrictive concerning the enforcement and cooperation regime instituted in the textiles and apparel chapter than that provided for under the general customs administration chapter. Therefore, the U.S.-SFTA will be a good model for U.S.-Indonesia FTA.[61] Under Chapter 5 article 5.5, Singapore must ensure that its officials have the authority to examine textile and apparel goods imported into Singapore, exported from Singapore, processing and manipulated in a free trade zone, or transshipped in Singapore en route to the United States, to ascertain that these goods correctly identify their country of origin, that the documents accompanying the goods correctly describe the goods, and that information may be shared with the United States.[62]

This model may be extremely hard to follow by Indonesia, but the more restrictive the provision, the fewer problems will occur in the future. Whereas the FTA can be a good way to enhance economic relation between the U.S. and Indonesia, it also can be a stimulant for a better legal system and administrative custom in Indonesia.

Technical Barriers to Trade

It is important to include this provision in the U.S.-Indonesia FTA. The provision is supposed to apply to technical regulations, standards and conformity assessment procedures as defined in the WTO Agreement on Technical Barriers to Trade[63] and implied in the APEC Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment.[64] The Uruguay Round on Technical Barriers to Trade specifies the rules of standard codes which cover processing method, conformity of assessment procedures, standardization by local government and non-governmental bodies.

Referring to prior USFTA, the US-SFTA has covered basic issues on technical barriers as it refers to the WTO Agreement on Technical Barriers to Trade and the Asia Pacific Economic Cooperation Forum (APEC) work program on Standards and Conformance.[65] The Article or Annex should explicitly determine the

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[61] Under U.S.-SFTA, Chapter 5, art 5.3. Singapore must track the movement of all textile trade, including activities within the free trade zone, and is obligated to turn over all information obtained to the United States.

[62] US-SFTA, supra note 26, Explanation of Article 5.5 (footnote 5-2)

[63] Agreement on Technical Barriers to Trade (GATT 1994), available online at http://www.wto.org/english/docs_e/legal_e/legal_e.htm. This agreement will extend and clarify the Agreement on Technical Barriers to Trade reached in the Tokyo Round. It seeks to ensure that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade. However, it recognizes that countries have the right to establish protection, at levels they consider appropriate, for example for human, animal or plant life or health or the environment, and should not be prevented from taking measures necessary to ensure those levels of protection are met.

[64] See, Phase I and Phase II; from The Third APEC Ministerial Meeting On Telecommunications & Information Industry (TELMIN3) Singapore, June 3-5, 1998. Available online at http://www.apecsec.org.sg/apec/ministerial_statements/sectoral_ministerial/telecommunications/1998/mra.html.

[65] US-SFTA, supra note 26, Chapter 6: Technical Barriers to Trade. Art 6.2. *[...the Parties should to the maximum extent possible seek to enhance their cooperation with each other in the area of technical regulations, standards, and conformity assessment procedures and to deepen the mutual understanding and awareness of each other's systems, including through: (a) exchanging information on technical*

various technical barriers to trade as they can represent misunderstanding of Indonesia's domestic economy, especially for sensitive goods in Indonesia, such as poultry, meats, alcoholic beverages, etc.[66] It applies to technical regulations, standards, and conformity assessment procedures. Overall, international standards are encouraged to be used if they are appropriate. However, it does not mean that each party has to change its level of protection as a result of standardization.

Government Procurement and Competition Policy

In Indonesia, the absence of a culture of competition is a major difficulty for foreign investors. Competition is a relatively new concept for Indonesian business after many years enjoying privileges and protection.[67] The lack of competition tied with large state involvement in the economy fosters corruption, cronyism, and collusion. However, Indonesia has made significant progress in recent years.[68] The competition law was a step forward, but the agency faces problems of interpretation and enforcement. Some 70 % of the 40 cases that were reviewed by the Business Competition Supervisory Commission between 2001 and 2004 corresponded to tender collusion involving a state-owned companies or a government agency.[69]

WTO Agreement on Government Procurement recognizes that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers. It is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement and the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level.

Regarding this condition, a U.S.-Indonesia FTA should ensure transparency in the operations of state-owned companies and guarantees that those firms operate under nondiscriminatory commercial considerations. The U.S.-Singapore FTA provides this provision in detail in Chapter 12. The provision states that *[...each party shall adopt or maintain measures to proscribe anticompetitive business conduct with the objective of promoting economic efficiency and consumer welfare, and shall take*

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regulations, standards and conformity assessment procedures; (b) holding consultations to address and resolve any matters that may arise from the application of specific technical regulations, standards and conformity assessment procedures; (c) promoting the use of international standards by each Party in its technical regulations, standards and conformity assessment procedures; and (d) facilitating and promoting mechanisms relating to technical regulations, standards and conformity assessment procedures that would enhance and promote trade between the Parties...]

[66] Indonesian Muslims, who constitute of 85% of the population, demand halal certification, which ensuring that cosmetics and other chemicals do not contain pork products.

[67] Pardede, Soy M. 2005. Development of Competition Policy and Recent Issues in East Asian Economies: The Indonesian Experience. Paper presented at the Second East Asia Conference on Competition Law and Policy, Bogor (May 3–4).

[68] In 1999, Indonesia enacted its competition law, creating an agency charged with investigating collusion in producer markets.

[69] WTO (World Trade Organization). 2003. Trade Policy Review: Indonesia. (January) Geneva.

appropriate action with respect to such conduct].[70] The U.S. – Indonesia Business Council has called on the Indonesian government to make the procurement and tendering process more transparent.[71] But still, the government of Indonesia has to deal seriously with corruption, cronyism, and collusion. Otherwise, the provision will be meaningless and Indonesia might have more claims from the US. This condition is far from what happen in the US system, which needs to be discussed more seriously by the parties.

Investment

The investment provision would be the most important part of U.S.-Indonesia FTA. There are mutual relationships between both countries; US investors would have more opportunities to explore Indonesia's natural resources, while Indonesia could create more employment and fund national development. The new government has been transforming Indonesia into a country with one of the most liberal policy and regulatory frameworks for investments in Southeast Asia. Serious efforts are being made to ensure that investors clearly understand investment laws, rules and regulations.

Many countries determined that foreign investors could not own more than a certain percentage of telecommunications or other strategic national infrastructure sectors or set conditions on ownership.[72] With regard to the percentage of foreign ownership allowed, foreign direct investment in Indonesia is conducted in two ways; namely joint venture with domestic investors or full (100%) foreign investment.[73] The government is continuing to review the lines of business open to foreign direct investment and the allowable percentage of foreign ownership.[74] With regard to the size of foreign investment, in practice, the Investment Board[75] determines the minimum reasonable paid up capital of the limited liability company to be established, depending on the nature and type of business.[76]

The Indonesian constitution guarantees foreign investors the following basic rights (a) Freedom from expropriation without just compensation; (b) Right to remit profits, capital gains, and dividends within the guidelines of the Bank of Indonesia, the country's central monetary authority; (c) Right to remit the proceeds of the liquidation of investments; (c) Right to obtain foreign exchange to meet principal and interest payments on foreign obligations.[77]

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[70] US-SFTA, supra note 26, art 12.2.

[71] Noting that Pertamina's monopoly on distributing and retailing ended in October 2005, allowing investor to play a role in oil refining and distribution.

[72] Many countries imposed performance requirements on foreign investors so that they had to hire a certain proportion of local workers, or use a particular level of local content.

[73] Indonesia welcomes foreign direct investment, whether by individuals or entities. The investment is made in the form of a limited liability company.

[74] The Government is preparing a unified law on Investment that will replace the existing Domestic Capital Investment Law and the Foreign Investment Law and regulate investment on all sectors.

[75] The Indonesian government office with jurisdiction over foreign and domestic investment matters

[76] For example, the reasonable paid up capital for a company in the service sector is normally US$100,000.

[77] See Investment Policies Statement by the Government of Indonesia, available online at Indonesia's Investment Coordinating Board http://www.bkpm.go.id/en/info.php?mode=baca&cat=7&t=Investment&info_id=18.

Indonesia is also a full member of the Multilateral Investment Guarantee Agency (MIGA), which is a member of the World Bank Group.[78] A standard bilateral agreement contains provisions to create favorable investment conditions for nationals of Indonesia and the contracting party on the basis of sovereign equality and mutual benefit.[79] This is designed to encourage investment in both countries.

However, problems still occur because of the overall investment climate, which is experiencing legal uncertainty, inconsistent policies in general, and discretionary policies of local governments. This climate is getting worse due to corruption and political risk issues. To minimize the risks, the FTA should explicitly describe and define the investment provision as clear as possible, particularly expropriation. In this case, a plain and simple definition section would be a great contribution. The provision might deal with most favored nations, national treatment, and minimum standard of treatment, which have been discussed specifically in the earlier sub-topic. The Indonesian government should undertake more vigorous and systematic enforcement of laws and regulation, corruption issues and promote transparency.

Article 15.6 US – SFTA clearly mentions expropriation and nationalization. *[...Neither party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization, except for a public purpose; in a non discriminatory manner; and on payment of prompt, adequate, and effective compensation]*. This provision is relevant to either US interest or Indonesia policy. It seems that there might not be a problem regarding expropriation.

In the Investor-State dispute settlement clause, the US-SFTA as well as the proposed US-Thailand FTA, mentions that *[...in the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non binding, third party procedures]*.[80] If any such dispute cannot be settled within six months following the date when the dispute has been raised through written notification, the dispute may be submitted to: the disputing Party's competent judicial or administrative bodies, in accordance with the laws and regulations of that Party; or the International Center for Settlement of Investment Dispute (ICSID); or an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Law (UNCITRAL). This kind of clause gives more options for the parties to settle their disputes. Therefore, US-Indonesia should adopt this provision to prevent stagnancy in dispute resolution through domestic judicial body in Indonesia.

Intellectual Property Rights (IPRs)

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[78] MIGA is a multilateral risk mitigator, promoting foreign direct investment into developing countries by insuring investors against political or noncommercial risks, mediating disputes between investors and governments, advising governments on attracting investment and sharing through online investment information services

[79] Read Government Regulation no. 20 of 1994 Concerning on Investment, and Government Regulation no. 83 of 2001 on the Amendment to Government Regulation no. 20 of 1994 on Ownership of Shares of Companies Established in the Framework of Foreign Investment.

[80] US-SFTA, supra note 26, Art. 15.14.

Based on the FTAs that the U.S. has entered into or proposes to sign with other countries, it intends to achieve a higher level of IPRs protection, beyond the minimum standards under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). Agreement on TRIPs affirms that *[...each member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property...]* and *[...With regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members]*. Countries concluding a free trade agreement with the U.S. are required to provide stricter IPRs regimes than they are required to provide to any other countries, in exchange for greater access to the U.S. market.[81] The free trade agreements that the United States has signed with Singapore and Chile contain chapters with intellectual property rights commitments, which states that Singapore and Chile must give preferential treatment to the U.S. right holders.[82]

The treaties concluded between the US and its trade partners are basically built on the provisions of the North American Free Trade Agreement (NAFTA) and the basic rules embodied in US legislation, even though the proposed FTAs are in principle open to negotiation.[83] In fact, all FTAs or treaties signed by the US are quite similar to one another.[84] While negotiation is possible on some issues, the US trade negotiators are committed to the basic structure of the model treaty and will only accept minor changes.

The significant provisions under U.S. FTAs are (a) greater patent protection for new subjects and restrictions on issuing of compulsory licenses; (b) patent-like protection for plant varieties; (c) exclusivity over test data and relevant undisclosed information; (d) protection of trademarks that are not visually perceptible; (e) copyright protection for digital technologies; and (f) effective remedies for enforcement of IPRs.[85]

Regarding these proposed provisions by the United States, there has been increasing concern about the costs and benefits of FTAs to developing countries.

On the one hand, increased economic cooperation between developed and developing nations can lead to an increased volume of international trade and investment in the latter.[86] On the other hand, the liberalized economic activities on the

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[81] For example, the US-JFTA requires Jordan to give effect to Articles 1 - 14 of the World Intellectual Property Organization (WIPO) Copyright Treaty (1996) and to ratify Articles 1-22 of the International Convention for the Protection of New Varieties of Plants (1991) (UPOV Convention). See, art. 4.1 of U.S.-Jordan FTA.

[82] See Chapter 17th of U.S.-Chile FTA, Chapter 16 U.S.-Singapore FTA.

[83] Under the Bipartisan Trade Promotion Authority Act of 2002 the Congress has stated that one overall negotiating objective for the US is to obtain in bilateral and multilateral agreements provisions that "reflect a standard of protection similar to that found in United States law". See Section 2102(b)(4)(A)(i)(II), codified as 19 USC 3802.

[84] See, for example, NAFTA, art. 1702, TRIPS, art 1.1 available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs, Article 4.1 of the US-Jordan FTA.

[85] Kuanpoth, supra note 23.

[86] In fact, this is the basic purpose of a bilateral agreement or FTA.

bilateral and regional levels will not suit the needs of developing nations.[87] This provision brings more problems considering Indonesian legal system. Indonesia still needs more clean and good regulations concerning intellectual property rights to minimize the piracy and other illegal activities of intellectual property infringement. On the one hand, Indonesia might propose that the US gives some exceptions for applications for intellectual property rights, specifically in educational materials and pharmaceuticals. The government's ability to meet public health needs may be limited if Indonesia is unable to make licensing compulsory, permit parallel imports, or grant local pharmaceutical firms the right to conduct clinical trials on patent medicines. Delaying the availability of generic medicines for more than 30 million poor people could be costly for Indonesia. Strict copyright protection on digital or pre-printed material for educational purposes might curtail offerings in schools and colleges.

There are some possible recommendations to these problems: (a) Indonesia should strengthen the enforcement of IPRs law continuously, and (b) on the on hand, the US should allow some flexibility on educational and public health issues. Thus, the provision of IPRs should address these exceptions clearly. Otherwise, the FTA will create more problems both for Indonesia and the US.

Dispute Resolution

In the dispute resolution clause, the FTA might allow for some involvement by the private sector. The government recognized that foreign investors must have an appropriate forum to resolve disputes that cannot be settled amicably. While such disputes would normally lie within the jurisdiction of a competent court,[88] parties may agree in certain cases to pursue extra-judicial adjudication and to choose an appropriate forum, including international conciliation or arbitration. As this consideration regards Indonesia, along with being a full member of MIGA, Indonesia has become a member of the International Center for Settlement of Investment Disputes (ICSID) at Washington DC.[89]

In December 2003, Indonesia's House of Representatives passed the Industrial Disputes Settlement Act (Law 2/2004).[90] This law introduced five dispute settlement procedures, namely bipartite settlement, mediation, conciliation, arbitration and an Industrial Relations Court.[91] The new labor courts, along with other dispute resolution mechanisms, will replace the existing system of regional and central labor dispute settlement committees, which unions and employers have often criticized as costly, very time-consuming and subject to corruption.[92]

The Industrial Relations Court, represented at both the district and Supreme Court level, will feature judges drawn from the general courts, assisted by ad hoc judges taken equally from lists submitted by trade unions and employer

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[87] Such trade deals will bring about the opposite results for those countries. The prospective social costs of the bilateral trade treaties include various problems relating to monopolization, public health, education, food security, environment, labor rights, technology transfer, biodiversity management, etc.

[88] Especially for Indonesia which does not have a good reputation in regulations and legal system.

[89] Indonesia became the member of ICSID on Feb 16, 1968.

[90] Former President Megawati signed into law in January 2004.

[91] Read Law 2 of 2004: the Industrial Dispute Settlement Act. Chapter II § 1 (3.1)

[92] Indonesia's Investment Board, http://www.bkpm.go.id/bkpm/news.php?mode=baca&info_id=496.

associations.[93] Parties must attempt mediation or conciliation before submitting petitions to the labor court.[94] In an effort to reduce processing time, the Act stipulates timeframes for court actions. The court will not charge parties for execution costs in suits valued below 15 million Rupiah ($1,500).[95] The Supreme Court oversees the Industrial Relations Court and may hear appeals in disputes of rights and employment termination cases.

In addition to the MIGA and ICSID, the U.S.-Indonesia FTA may give each party more choices in resolving industrial disputes. This provision could give mutual benefit and more certainty for both parties. However, the Government of Indonesia needs to reform any other related matters to the process of dispute settlement, especially how to avoid corruption, collusion and cronyisms.

The U.S. – Jordan FTA established a model by including in the main text a section on labor that is subject to the same dispute settlement procedures as other provisions in the agreement. The Chile and Singapore FTAs reaffirm each party's existing commitment to the core labor standards contained in the ILO's Declaration on Fundamental Principles and Rights at Work.[96] These two FTAs followed the U.S.-Jordan standard by including workers' rights provisions in the body of the agreement and making violations subject to the same dispute settlement procedures as commercial disputes.[97] However, the U.S.-Chile and U.S.-Singapore FTAs follow the practice of basing labor obligations on the effective enforcement of each country's own laws in trade related sectors.[98]

On the other hand, the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR) model requires consultations if a party believes that another party is not complying with identified core labor standards.[99] Under the agreement, only a partner government can invoke consultations and subsequent enforcement measures. The provision requires additional consultations or a meeting of the CAFTA-DR cabinet level Free Trade Commission. If the cabinet cannot resolve the dispute, the matter may be referred to a dispute settlement panel.

Based on these two models, U.S.-Indonesia FTA should adopt the basic labor and dispute settlement framework of the CAFTA-DR because it creates mechanisms to strengthen each party's institutional capacity. This system assists the parties in establishing priorities for and carries out initiatives on effectively applying fundamental labor rights, legislation and practice relating to ILO Convention 182.[100] Regarding environmental dispute settlement, U.S.-Indonesia FTA should review the CAFTA-DR system. Under the CAFTA-DR, a single member of the Environmental

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[93] Law 2 of 2004, supra note 140, Chapter II § 2 (61)

[94] Id. Chapter III § 1 (55)

[95] Id. Chapter V § 2 (122)

[96] Elliott, Kimberly Ann. 2004. Labor Standards, Development, and CAFTA. Washington: Institute for International Economics.

[97] Gary Clyde Hufbauer & Sjamsu Rahardja, Toward US-Indonesia FTA. 2007. Chapter 4, at 3.

[98] Elliott, Kimberly Ann, and Richard B. Freeman. 2003. Can Labor Standards Improve Under Globalization? Washington: Institute for International Economics.

[99] Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR), Jan 28, 2004, 43 I.L.M. 514 (2004), Chapter 16.

[100] Hufbauer, supra note 97, Chapter 4, pg.16.

Affairs Council may easily request a detailed factual record for a case by request.[101] This record contains provisions for including environmental expertise when resolving disputes. If a party does not comply with the panel's finding that the party is failing to enforce its environmental laws, CAFTA-DR allows for monetary assessments to address the underlying enforcement problem. However, the main problem is a financial requirement. In this case, initiative and funding should be provided to strengthen the institutional and technical capacity needed to deal with infringements of environmental regulations in Indonesia.[102]

Agriculture

Agricultural provisions will be a controversial part of U.S.-Indonesia FTA. The livelihoods of Indonesian farmers might be threatened if the FTA is approved. Once the FTA is implemented, US agricultural products will be able to enter into Indonesian market easily, and vice versa. In 2005, the U.S.-Indonesia trade balance in agricultural products was a surplus of about $746 million. That year, the United States exported over $956 million in agricultural products to Indonesia. During that same period, the United States imported about $1,702 million of agricultural products from Indonesia.[103]

However, the key point is that local Indonesian farm products are unlikely to be able to compete with US counterparts, as the US annually spends billions of dollars in subsidies to its farmers, for corn and maize for example, allowing US farmers to sell their products in the world market, including Indonesia, at low prices.[104] This is one of the reasons why the Doha Round collapsed.[105] This condition might threat the livelihood of Indonesian farmers if the FTA is concluded. In addition, technical barriers and illegal transshipment can be a problem as well. Indonesia may be a transit point for illegal transshipment to the United States. Corruption is the main reason behind the rising share in foreign products on Indonesia's domestic market.

In order to deal with this problem, U.S.-Indonesia FTA should consider these key elements:

(a) Export Subsidies.

The United States and Indonesia should not use agricultural export subsidies in each other's markets, unless the exporter believes that a third country is subsidizing its exports into the other FTA country's market. In such cases, special provisions could

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[101] CAFTA-DR, supra note 99, Chapter 17.

[102] Hufbauer, supra note 97, Chapter 4,pg.17.

[103] USDA (United States Department of Agriculture). 2007. US Trade Internet System. Washington. Available at http://www.fas.usda.gov.; USITC (US International Trade Commission). 2003. US-Singapore Free Trade Agreement: Potential Economy wide and Selected Sectoral Effects. Washington.

[104] Even though U.S. Trade Representative Susan Schwab reaffirmed U.S. commitment to go even further than the 60 percent reduction in trade-distorting domestic support spending for farmers offered since October 2005, some other G-6 parties were unwilling to offer real increases in agricultural market access through lower tariffs and other barriers. *See*, Andrzej Zwaniecki, U.S. Must Reform Farm Policy, U.S. Agriculture Secretary Says, Aug 31, 2006, available online at http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=August&x=20060831172749SAikceinawz0.923443

[105] Merlinda D. Ingco & John D. Nash, What's at Stake? Developing Country Interests in the Doha Development Round – Agriculture and the WTO. The World Bank and Oxford University Press. 2004. at. 19.

provide measures to counter the third country's subsidies; In this case, it would be hard to believe that U.S. would reduce subsidies for their farmers and voluntarily engage in the FTA in favor of Indonesia. Similar situations existed with other proposed U.S. FTAs, such as Malaysia, Thailand and Korea, and the protests still try to oppose this US-favored provision.

(b) Rules of Origin and Safeguard Measures.

The Agreement should address strong but simple rules of origin, consistent with other U.S. free trade agreements in the region. The general rules of origin are supposed to ensure that only U.S. and Indonesian goods benefit from the preferential market access commitments. More detailed provisions apply to a few agricultural goods.[106] Under the Agreement, the United States and Indonesia may affirm their existing rights and obligations under the WTO Sanitary and Phytosanitary Measures (SPS) Agreement.[107] The FTA might also deal and negotiate more detailed provisions which would provide greater benefits for both parties, such as export state trading enterprises and an agricultural trade forum.

Free trade may increase employment opportunities in some sectors, but that has not always transformed into higher wages and better working conditions for a large number of workers in developing countries.[108] Similarly, some groups of farmers may be able to reap occasional commodity price hikes as a result of a liberalized market, but market imperfections along with structural problems may prevent many farmers from enjoying the benefits of free trade.[109] In such a situation, social protections must go along with free trade to reduce adverse effects on those at the bottom of the socio-economic hierarchy. This will be a controversial issue for the parties, especially Indonesia.

The United States has never required adherence to new and detailed environmental and labor standards on any signed agreements. Instead, the agreements commit countries to promoting workers' rights and protecting the environment generally; proclaiming that each government should enforce its own domestic environmental and labor laws and not weaken laws or reduces labor protection. [110]

CONCLUSION

Even though bilateral free trade agreements are not a major element of Indonesia's trade diplomacy and policy, Indonesia is beginning to contemplate more seriously the

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[106] Especially for sensitive list goods for both parties.

[107] Read Article 20 of the General Agreement on Tariffs and Trade (GATT 1994), which allows governments to act on trade in order to protect human, animal or plant life or health, provided they do not discriminate or use this as disguised protectionism. In addition, there are two specific WTO agreements dealing with food safety and animal and plant health and safety, and with product standards.

[108] Vilailuk Tiranutti, "Protecting Workers from the Effects of FTAs." The Nation, Bangkok, October 3, 2006.

[109] Worawan Chandoeywit, *"Mechanisms for Adjustment or Social Safety Nets,"* (noting that the FTAs between Thailand and seven other countries (namely, Australia, China, India, New Zealand, Peru, Japan and the United States) will create 80,000 jobs in the garment and leatherwear industries. However, another 20,000 jobs in the wood, paper, printing, chemical products, rubber and plaster, and metal and metal products industries were expected to disappear.)

[110] Hufbauer, supra note 97, Chapter 4, pg. 2

role of bilateral FTAs in promoting trade and economic cooperation with a number of countries. Indonesia has extensive economic and trade relations with the United States because it is Indonesia's second most important trade and economic partners. Strengthening political and overall relations with the United States could also be a major factor in forming a free trade agreement.

However, concluding a free trade agreement with the United States will be more difficult than with other developing countries. It will involve wider coverage, and the commitments will be deeper as they will cover not only cross border problems but also many other issues, such as domestic regulations, corruption, legal enforcement, etc. A free trade agreement with the United States could have a great effect on Indonesia's economic and legal reform agenda. In designing a free trade agreement between Indonesia and the United States, the negotiators need to consider a proportional economic analysis, well-prepared negotiation, and appropriate elements of the agreement. Overall, the US – Indonesia FTA has the possibility of being successful because it could give benefits for both countries. However, there would be significant problems in implementing it. The problems would mainly arise in agriculture, investment, and IPRs issues. These problems will remain, unless Indonesia continues to strengthen its legal system and law enforcement, encourages transparency, improves facilities and seriously deals with corruption issues. On the other side, the US also needs to lower its trade liberalization standards and provide flexibility regarding public issues.

Furthermore, in order to be ready to engage in an FTA, both countries, Indonesia and the United States, should prepare and take more action in some important issues. Improved customs facilitation is crucial for enhanced Indonesian access to the US market, and vice versa. Regulations on product labeling, technical standards and professional workers need to be improved. Indonesia should work with the United States to enforce its IPR laws and to resolve the sensitive issues in both countries. Even though the U.S. – Indonesia FTA is not possible in the near future, both countries should start talks and preparations because it is worth pursuing for political, legal and economic reasons, particularly for Indonesia.

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