

**DISPUTE SETTLEMENT BETWEEN INDONESIA AND SOUTH KOREA
(Allegations of Dumping Practice by Indonesia on Paper Products)**

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ABSTRACT : This research entitled Dispute Settlement Between Indonesia and South Korea (Allegation of Dumping Practice by Indonesia on Paper Product) aims to analyze the dispute settlement between Indonesia and South Korea on the allegations of dumping practice. The research method is Juridical Normative. Indonesia is one of the WTO members which have ratified the Agreement Establishing the WTO by Law Number 7 in 1994. It means that Indonesia is a subject to the provisions of the WTO including the provisions on anti-dumping disputes. On 30 September 2002, Indonesia and South Korea were involved in the import duty case of anti-dumping paper products. It was occurred when a South Korean paper industry proposed anti-dumping petitions against Indonesian paper products to the Korean Trade Commission (KTC). The Indonesian paper products are charged with dumping including 16 products which belong to the group of uncoated paper and paper board used for writing, printing, or other graphic purpose and carbon paper, self-copy paper and other copying.

Keywords: dispute settlement, dumping, Indonesia, South Korea.

INTRODUCTION

World Trade Organization (WTO) is the only international organization which specifically regulates and facilitates international trade issues, serves as a dispute resolution institute, and also gives a verdict of settlement towards its members. One of the issues regulated in the WTO is a regulation of the Anti-Dumping which is ruled through the Anti-Dumping Agreement (Anti-Dumping Agreement or the Agreement on the Implementation of Article IV of the GATT 1994). Dumping is the act of exporting goods to another country with a price which is lower than the normal price on the same goods in the importing country. To anticipate the emergence of dumping, a countermeasure given by the importing country is necessary on goods from the exporting country which does dumping in the imposition of import duties. That countermeasure is known as the Anti-Dumping¹.

WTO rules hold firmly the principles, but still allow for exceptions. The three major issues in it are:

1. The action against dumping (selling at cheaper prices unfairly)

1 Christophorus Barutu, 2007, *Ketentuan Anti-Dumping, Subsidi dan Tindakan Pengamanan dalam GATT dan WTO*, PT. Citra Aditya Bakti, Bandung, page 2.

2. Subsidies and actions in return to balance subsidy (countervailing measures).
3. Emergency measured acts (emergency measures) are to temporarily restrict the imports in order to secure the domestic industry (safeguards). If a company sells its products to other countries with the price which is lower than the normal price in the domestic market, then it is called the dumping of the product. This is one of the issues in the WTO agreements which are not judgmental, but it focuses more on actions dos and don'ts for the country to overcome the dumping. This Agreement is known as the Anti-Dumping Agreement (Anti-Dumping Agreement) or the Agreement on the Implementation of Article VI of GATT 1994).

Indonesia as the country which does the international trade and is also a part of the WTO was ever accused for dumping the paper products which were exported to South Korea. This case was occurred when a South Korean paper industry proposed anti-dumping petitions against Indonesian paper products to the Korean Trade Commission (KTC) on September 30, 2002. The company which was charged with dumping was Indah Kiat Pulp & Paper Inc., Pindo Deli Pulp & Mills Ltd., Tjiwi Chemical Paper Factory Inc., and April Pine Paper Trading Pte Ltd.²

DISCUSSION

Dumping in International Trade.

Definition of Dumping.

According to the dictionary of the international trade terms, dumping is the practice of selling a product in the export destinations at price which is below than normal that aims to control the overseas market. On the other hand, according to the rules of the General Agreement on Tariffs and Trade (GATT), Dumping is defined as a product put into another country market with a price which is lower than the normal one. This formula means a price is lower than the sale price in the exporting country. In this case, there is an absence of the seller in the exporting country which sells the product at the price which is lower than the price in the importing country although it has been corrected with transportation costs and other costs that are prevalent in trade³.

Types of Dumping in International Trade.

Economists generally classify dumping into three categories, i.e. sporadic dumping, persistent dumping and predatory dumping. Besides, in its development, the term of diversionary dumping and dumping down stream occurred⁴.

a. Sporadic Dumping.

Sporadic dumping is the dumping done by selling goods in foreign markets in a short period of time at a price which is lower than the domestic price of the exporting country or the cost production of goods. It is intended to eliminate the unwanted goods. This type of dumping can disrupt the domestic market due to the uncertainty of the demands from the outside that can change suddenly.

2 Hata, 2006, *Perdagangan Internasional dalam Sistem GATT & WTO*, PT. Refika Aditama, Bandung, page 8.

3 Eddie Rinaldy, 2000, *Kamus Istilah Perdagangan Internasional*, Pt. RajaGrafindoPersada, Jakarta, page 74.

4 Hendra Halwani, 2002, *Ekonomi Internasional dan Globalisasi Ekonomi*, Ghalia Indonesia, Jakarta, page 358.

b. Persistent Dumping.

Persistent dumping is the sale of goods in foreign markets at price below the domestic price or cost of production which is conducted permanently and continuously that is apparently a continuation of selling goods which have been done before. The sale is conducted by producers of goods who have a monopolistic market in the country with an intention to maximize the total profit by selling goods at a higher price in the domestic market⁵.

c. Predatory Dumping.

Predatory dumping term is used to an export at low prices with the aim of expelling competitors from the market in order to gain monopoly power in the market of the importing country. The worst consequence of this kind of dumping is the death of companies that produce similar goods⁶.

d. Diversionary Dumping.

Diversionary dumping is the dumping done by foreign manufacturers who sell goods in the third country market with unfair prices and the goods are later processed and shipped for sale to other markets.

e. Down Stream Dumping.

Down stream dumping is the dumping which is conducted when foreign producers sell their products with low price than other producers in the domestic market and the product is further processed and shipped for resale to other country markets⁷.

Furthermore, when it is added to the opinion of Robert Willig, the classification of dumping is considered in the purpose of the export as follows:

a. Market Expansion Dumping.

Exporting companies can achieve a profit by setting the "mark-up" which is lower in the import market because it faces a greater elasticity of demand because of the low price offered.

b. Cyclical Dumping.

The motivation of this dumping occurs from the presence of the unusually low or unclear marginal cost, so the production costs which is along with the condition of excessive production capacity is separated from the manufacture of related products.

c. State Trading Dumping.

Background and motivation may be the same as the other type of dumping, but the standout one is the acquisition.

d. Strategic Dumping.

This term was adopted to describe the export which is adverse the rival companies in the importing country through the overall strategies of exporting country, either by cutting the export costs or by restricting the entry of products into the market of the exporting country. If the sharing part of the domestic market is big enough for each independent exporter in the economies of scale, then they will gain profit from the cost which

5 Sukarni, 2002, *Regulasi Anti-Dumping, di bawah Bayang-bayang Pasar Bebas*, Sinar Grafika, Jakarta, page 40

6 Mohammad Sood, 2011, *Hukum Perdagangan Internasional*, Rajawali Pers, Jakarta, page 121.

7 Sukarni, *Op, Cit*, page 42.

Functions and composition.

The General Council discharges its responsibilities under the DSU through the DSB (Article IV:3 of the WTO Agreement). Like the General Council, the DSB is composed of representatives of all WTO Members. These are governmental representatives, in most cases diplomatic delegates who reside in Geneva (where the WTO is based) and who belong to either the trade or the foreign affairs ministry of the WTO Member they represent. As civil servants, they receive instructions from their capitals on the positions to take and the statements to make in the DSB. As such, the DSB is a political body. The DSB is responsible for administering the DSU, i.e. for overseeing the entire dispute settlement process.

The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements (Article 2.1 of the DSU). A later chapter on the stages of the dispute settlement procedure will explain exactly what all these actions mean. In less technical terms, the DSB is responsible for the referral of a dispute to adjudication (establishing a panel); for making the adjudicative decision binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing “retaliation” when a Member does not comply with the ruling.

The DSB meets as often as is necessary to adhere to the time-frames provided for in the DSU (Article 2.3 of the DSU). In practice, the DSB usually has one regular meeting per month. When a Member so requests, the Director-General convenes additional special meetings. The staff of the WTO Secretariat provides administrative support for the DSB (Article 27.1 of the DSU).

Decision-making in the DSB.

The general rule is for the DSB to take decisions by consensus (Article 2.4 of the DSU). Footnote 1 to Article 2.4 of the DSU defines consensus as being achieved if no WTO Member, present at the meeting when the decision is taken, formally objects to the proposed decision. This means that the chairperson does not actively ask every delegation whether it supports the proposed decision, nor is there a vote. On the contrary, the chairperson merely asks, for example, whether the decision can be adopted and if no one raises their voice in opposition, the chairperson will announce that the decision has been taken or adopted. In other words, a delegation wishing to block a decision is obliged to be present and alert at the meeting, and when the moment comes, it must raise its flag and voice opposition. Any Member that does so, even alone, is able to prevent the decision.

However, when the DSB establishes panels, when it adopts panel and Appellate Body reports and when it authorizes retaliation, the DSB must approve the decision unless there is a consensus against it (Articles 6.1, 16.4, 17.14 and 22.6 of the DSU). This special decision-making procedure is commonly referred to as “negative” or “reverse” consensus. At the three mentioned important stages of the dispute settlement process (establishment, adoption and retaliation), the DSB must automatically decide to take the action ahead, unless there is a consensus not to do so. This means that one sole Member can always prevent this reverse consensus, i.e. it can avoid the blocking of the decision (being taken). To do so that Member merely needs to insist on the decision to be approved.

No Member (including the affected or interested parties) is excluded from participation in the decision-making process. This means that the Member requesting the establishment of a panel, the adoption of the report or the authorization of the suspension of concessions can

Dumping Provisions in the GATT-WTO.

GATT regulates dumping problem which is considered as a form of unfair competition through price discrimination. Basically, dumping is prohibited because it brings harm the economy of another country. The general criteria given by the GATT about dumping is that it may cause material loss to existing industry and obstruct the establishment of the domestic industry. In short, a country is considered doing dumping if: 1) There is a dumping that is less than fair value, 2) There is a material loss in the importing country, and 3) There is an existence of causal link between dumping prices with the loss. After considering the criteria, if the dumping which is less than fair value has been done, but it does not cause any harm, then the dumping is not prohibited. [Article 2 Agreement on Implementation of Article VI of GATT 1994 (the Agreement on implementation of Article VI of GATT 1994).] John H. Jackson as quoted from the book Sukarni [Sukarni, Op, Cit, p. 45.] said that not all dumping can harm the importing country and benefit the exporting country. In economic theory, there are several things that determine whether dumping can be profitable or not as follows: 1) The demand for the firm's product in its own country abroad, 2) The barriers to reentry into the exporting market and 3) the nature of the the firm's cost structure.⁸

Dispute Settlement Body (DSB).

This institution was created by the WTO Agreement and has functions to implement the rules and procedures on consultation and dispute resolution as well as the related agreements in another available regulation. Therefore, the DSB is authorized to form a panel, receive panel's report, and also report to a new agency; i.e. Appellate Body, supervise the implementation of verdicts and recommendations, and authorize the suspension of concessions and other obligations under the related agreement. DSB shall notify the council and WTO committees relating on development of disputes. DSB has to conduct a meeting as needed to perform its functions. If any provision or procedure in this agreement stipulates that the DSB should make a verdict, then the verdict will be made by consensus. DSB's duty is not only giving a recommendation or decision, but also supervising the verdict implementation and its recommendation. If DSB receives the report stating that the complaint is in contradiction to General Agreement or in line with Covered Agreements, so the recommendation which is given permits the winning party to retaliate, to suspend concessions or other obligations to the infringer. The level of retaliation should be equivalent to the relevant international agreements⁹.

The operation of the (WTO) dispute settlement process involves the parties and third parties to a case, the DSB panels, the Appellate Body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions. This chapter gives an introduction to the WTO bodies involved in the dispute settlement system. The involvement of the parties and third parties, the primary participants in a dispute settlement proceeding, has already been outlined here. The precise tasks and roles of each of the actors involved in the dispute settlement process will become clear in the later chapter on the stages of the dispute settlement process. Among the WTO bodies involved in dispute settlement, one can distinguish between a political institution, the DSB, and independent, quasi-judicial institutions such as panels, the Appellate Body and arbitrators.

⁸ Mohammad Sood, *Op, Cit*, page 121

⁹ *Article 2 Agreement on Implementation of Article VI of GATT 1994.*

ensure that its request is approved by merely placing it on the agenda of the DSB. In the case of the adoption of panel and Appellate Body reports, there is at least one party which, having prevailed in the dispute, has a strong interest in the adoption of the report(s). In other words, any Member intending to block the decision to adopt the report(s) has to persuade all other WTO Members (including the adversarial party in the case) to join its opposition or at least to stay passive. Therefore, a negative consensus is largely a theoretical possibility and, to date, has never occurred. For this reason, one speaks of the quasi-automaticity of these decisions in the DSB. This contrasts sharply with the situation that prevailed under GATT 1947 when panels could be established, their reports adopted and retaliation authorized only on the basis of a positive consensus. Unlike under GATT 1947, the DSU thus provides no opportunity for blockage by individual Members in decision-making on these important matters. Negative consensus applies nowhere else in the WTO decision-making framework other than in the dispute settlement system. When the DSB administers the dispute settlement provisions of a plurilateral trade agreement (of Annex 4 of the WTO Agreement), only Members that are parties to that agreement may participate in decisions or actions taken by the DSB with respect to disputes under these agreements (Article 2.1 of the DSU). With respect to the more operational aspects of the DSB's work, the Rules of Procedure for Meetings of the DSB¹ provide that the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council apply, subject to a few special rules on the chairperson and except as otherwise provided in the DSU. An important organizational aspect of these general rules is the requirement for Members to file items to be included on the agenda of an upcoming meeting no later than on the working day before the day on which the notice of the meeting is to be issued, which is at least ten calendar days before the meeting (Rule 3 of the Rules of Procedure). In practice, this means that items for the agenda must be made on the 11th day before the DSB meeting, and on the 12th or 13th day if the 11th day were to fall on a Saturday or Sunday.

Role of the chairperson.

The DSB has its own chairperson, who is usually one of the Geneva-based ambassadors, i.e. a chief of mission of a Member's permanent representation to the WTO (Article IV:3 of the WTO Agreement). The chairperson is appointed by a consensus decision of the WTO Members. The chairperson of the DSB has mainly procedural functions, that is, passing information to the Members, chairing the meeting, calling up and introducing the items on the agenda, giving the floor to delegations wishing to speak, proposing and, if taken, announcing the requested decision. The chairperson of the DSB is also the addressee of the Members' communications to the DSB.

In addition, the chairperson has several responsibilities in specific situations. For instance, the chairperson determines, upon request by a party and in consultation with the parties to the dispute, the rules and procedures in disputes involving several covered agreements with conflicting "special or additional rules and procedures" if the parties cannot agree on the procedure within 20 days (Article 1.2 of the DSU). The chairperson can also be authorized by the DSB to draw up special terms of reference pursuant to Article 7.3 of the DSU. The DSB chairperson is further entitled to extend, after consultation with the parties, the time-period for consultations involving a measure taken by a developing country Member, if the parties cannot agree that the consultations have concluded (Article 12.10 of the DSU). In dispute settlement cases involving a least-developed country Member, the least-developed country can request the DSB chairperson to offer his/her good offices, conciliation and mediation before the case goes to a panel (Article 24.2 of the DSU). Lastly, the DSB chairperson is to be

consulted before the Director-General determines the composition of the panel under Article 8.7 of the DSU, and before the Appellate Body adopts or amends its Working Procedures (Article 17.9 of the DSU).

Dumping Case Settlement Indonesia and South Korea.

The resolution in the case of paper dumping sued by South Korea to Indonesia to some paper exporting companies, such as Indah Kiat Pulp & Paper Inc, Pindo Deli Pulp and Mills Ltd, and Tjiwi Chemical Paper Factory Inc., and April Pine Paper Trading Pte. Ltd was won by Indonesia.. Indonesia has exercised its rights and benefits in the mechanisms and principles of multilateralism in the WTO trading system, especially the principle of transparency. For the first time, Indonesia gained the benefit from the Dispute Settlement Mechanism (DSM) as the main complainant who felt harmed by the application of trade rules that were applied by other WTO members.

Indonesia proposed the objection on the imposition of Korean anti-dumping policies to DSM dealing with Anti-Dumping case for Korea-Certain Paper Products. On 4 June 2004, Indonesia took South Korea to conduct dispute settlement on the imposition of South Korean anti-dumping act towards paper products from Indonesia. The results of these consultations did not satisfy both parties. Indonesia then submitted a request to the DSB of the WTO that South Korean anti-dumping act violated their obligations in WTO and also several provisions of the Anti-Dumping agreement. On 28 October 2005, the DSB of the WTO delivered Panel Report to all members and said that the South Korean Anti-Dumping was inconsistent and violated the provisions of the Anti-Dumping Agreement. Both parties eventually reached an agreement that South Korea should implement the DSB recommendations and determine a timetable for implementing the DSB recommendations (reason-able period of time / RPT).

As a result of the legal dispute between Indonesia and South Korea, Panel Report of the DSB of the WTO stated that there were a number of violations committed by the Korean Trade Commission (KTC), namely: Article 6 paragraph 8, the Anti-Dumping Agreement (ADA) and paragraph 7 of Annex II in implementing special circumspection; Article 6 paragraph 7, the ADA in terms of disclosure of the resulted verification; Article 6 paragraph 4, the ADA in terms of disclosing the detail calculations of normal value by the constructed value method; Article 3, paragraph 4, the ADA in terms of investigating the impact of imports at dumping prices to the domestic industry; Article 6 paragraph 2, the ADA in terms of denial and gives the opportunity to provide comments on the results of the evaluation of loss; and Article 6 paragraph 5, the ADA cannot provide acceptable reasons to keep the available information which is contained in the request for an investigation of South Korea domestic industry. As a result of Indonesia's victory, South Korea had to comply with the Panel's decision. On 28 December 2006, the DSB published the Panel report dealing with the anti-dumping dispute. In the Panel's report, the DSB decided that KTC had violated the provisions of the rules relating to the determination of dumping and loss. In addition, the DSB also made recommendations to South Korea in order to do the recalculation on policy of the Anti-Dumping duties towards Indonesian paper products and made appropriate adjustments for the obligations in the WTO agreements¹⁰.

Dispute Resolution Process

The first stage to do to resolve international trade disputes is through bilateral consultations

10 Hata, 1998, *Aspek-aspek Hukum dan Non Hukum Perdagangan Internasional dalam Sistem GATT & WTO*, STHB, Bandung, page 170.

between the disputing countries. It is same as the case between Indonesia and South Korea relating with South Korea's policy towards Indonesian paper products. South Korea applied anti-dumping import duty in Indonesian paper products followed by a petition which was proposed by South Korean paper industries. Indonesia asked for doing a bilateral consultation between the two countries (Indonesia and South Korea) on 4 June, 2004. Indonesia's proposal was followed-up by conducting the consultation between the two countries which was began on 7 June, 2004. In this bilateral consultation, the Indonesian party requested South Korea especially Korean Trade Commission (KTC) to revoke anti-dumping duty on Indonesian paper products. Because the consultation did not obtain any bilateral agreement between the two parties, it failed to resolve the issue. For that reason, Indonesia asked the WTO to form panel to investigate the anti-dumping case.

Bilateral discussion between Indonesia and South Korea did not result satisfaction for Indonesia, so Indonesia moved to the second stage about forming a panel through the Dispute Settlement Body or DSB which is an organization representing the General Council of the WTO and is responsible for conflict resolution. DSB is also the only institution which has the authority to form the panel of experts to review cases. DSB can accept or reject the panel's decision or a decision on appeal. Therefore, on 16 August 2004, Indonesia requested the establishment of the Panel and DSB suspended Indonesia's request to establish a panel on 31 August, 2004, and the DSB formed panel on September 27, 2004 (5).

The panel members consisted of Canada, China, EU, Japan and the United States. In reviewing this dispute, the Panel conducted two sessions, i.e. on 1-2 February 2005 and 30 March 2005. On 28 October 2005, the Panel expressed its findings in this dispute. Panel found that: (a) the KTC acted inconsistently with its obligations under Art 6.8 and 7 of Annex II in the calculation of interest expense for Indonesian companies. It was found that the KTC failed to apply special caution in its determination whether the use of the interest expense for companies trading is appropriate action or not and the strengthen of that interest expense to interest expense for other companies, and (b) the Panel found that the KTC acted inconsistently with the obligations specified in Art 6.2 by failing to allow Indonesian exporters to comment on the failure of KTC policy (6).

DSB adopted the panel's findings and accepted on 28 November 2005. Indonesia and South Korea notified the understanding procedure of DSB's decision and Indonesia accepted the Panel's decision by firstly consulting to Article 21.5 of the DSB decision and on 28 September 2007, the Panel published the report of Article 21.5. South Korea was suggested by the Panel to revise and recalculate anti-dumping duties policy on the company.

Implications Paper Dispute of Indonesia-South Korea

The Problem on charging anti-dumping Indonesian paper products in South Korea were eventually brought to the WTO and discussed in the Dispute Settlement Body which provided some implications for the relationship between Indonesia and South Korea, especially in the paper industry sector. Although the Korean Trade Commission (KTC) had decided to drop the cases about the dumping of paper from Indonesia, Korean producers had not responded actively. This happened due to the cessation of dumping which had not been widely notified to producers in Korea. Businessman who was accused of selling cheap paper abroad than in Indonesia was peevish with Korea. They urged the Indonesian government to retaliate or do the reprisal to Korea. The government did not immediately comply with the request of employers. The government said that they would wait the decision of initiation which was going to be announced at the end of October 2010. In short, Korea's claim in the dumping of

Indonesian paper product had made producers furious and disappointed with the Korean government which made them demanding the Indonesian government to retaliate. For example, the party of Sinarmas Inc. urged the government to act of retaliation or reprisal related to the imposition on anti-dumping duties of paper products in South Korea. In addition, according to Gusmardi Bustami, the Director of International Trade Cooperation Ministry of Industry and Trade, the South Korean government's act of anti-dumping Indonesian paper products was a reflection of the efforts that South Korea did not allow Indonesian paper to enter, so another assumption occurred that Korea was doing the paper dumping in Indonesia. Gusmardi explained after the imposition of anti-dumping by Korean, Indonesian paper exports to Korea plummeted. Indonesian exporting paper to Korea had reached the highest rate of up to \$ 150 million while the current had dropped drastically to \$ 50 million. In short, the alleged dumping and the imposition of anti-dumping charges had made Indonesian paper businessman peevish. Although this case had been brought to the DSB's agenda, but it still resulted the decline of paper export to Korea. This has implications for the domestic paper industry of each country¹¹.

CONCLUSION

Dumping in the context of international trade law is a form of international price discrimination which is performed by a company or exporter who sells goods at lower prices in foreign markets than in the domestic market itself in order to gain an advantage over the product. Early stage of dispute resolution by Indonesia in the case of the Anti-Dumping is doing consultations with South Korea followed by the Establishment of Panel because of the unsatisfactory result in the consultation. DSB of WTO later states that South Korea has violated the provisions of the Anti-Dumping Agreement in applying the Anti-Dumping duties on Indonesian paper products. DSB of WTO states that KTC is proved to have violated in this case and recommended South Korea to conduct a review of its policy towards BMAD Indonesian paper products and made appropriate adjustments dealing with the obligations in the WTO agreements.

The Dispute Settlement Mechanism which was applied by the WTO to resolve trade disputes between countries can be quite effective in resolving trade disputes between countries, but it needs a long period of time. In the Indonesia's case, Indonesia had proposed the case in 2002, but it actually finished in 2010 by deciding the victory for Indonesia and removing the anti-dumping duties. Eight years was needed by Indonesia to be able to actually win its dispute with South Korea. It can be concluded that the Dispute Settlement Mechanism applied by the WTO to resolve trade disputes between countries are quite effective. Although the time is quite long to actually get a final decision, but it is able to solve the trade disputes between members of the WTO.

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Article 2 Agreement on Implementation of Article VI of GATT 1994.