

Indonesia's Regulation and Implementation of Subsidies in View of Agreement on Subsidies and Countervailing Measures 1995-WTO

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Abstract

Regulation and implementation of subsidies in Indonesia is in the form of financial assistance provided by the government either directly or indirectly to companies, industries, industrial groups or exporters. With the aim of increasing export activities and reducing import activities for the welfare of the people and not violating the provisions of the 1945 Constitution, as the definition of subsidies is explained in the PP. Number 34 of 2011 concerning Anti-Dumping Measures, Compensatory Measures and Trade Security Measures Article 1 paragraph 8. In the Indonesian Government's policy, subsidies are given as long as they are to achieve people's welfare, and do not violate the order in the 1945 Constitution. However, in terms of government policy to improving people's welfare and protecting the domestic economy, often causing problems in the scope of international trade. This article aims to examine and understand how subsidies are regulated and implemented in Indonesia in terms of the Agreement On Subsidies And Countervailing Measures 1995-WTO. This research is normative legal research which examines written law based on applicable laws and regulations. The results of this research are that based on the policy issued by the Indonesian government, subsidies are given in order to realize the domestic economy, so based on this policy, basically the Agreement On Subsidies And Countervailing Measures 1995-WTO limits subsidies, so that their use does not cause harm to other countries' industries.

Keywords: Subsidies; Agreement on Subsidies and Countervailing Measures 1995-WTO; WTO

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INTRODUCTION

International trade in this era of globalization greatly affects the economic growth and development of a country, because it competes with each other in the international market or free market, as well as increasing technological development that is still not as advanced as developed countries. One of the advantages of international trade is that it allows a country to be able to specialize in order to produce cheap goods and services. From this, there are many tangible benefits of international trade, namely in the form of increased state income, foreign exchange sources, improving the quality of consumption, increasing markets and profits, improving technology and expanding employment. (Rinaldi et al., 2017) International trade in this era of globalization is indeed experiencing a very rapid development from time to time, especially with the existence of free trade patterns, in this case it will certainly open up enormous opportunities for the domestic product market to the international market, but this can also happen the other way around, which will also open up opportunities for the entry of export products or foreign products into the domestic market. In this case, of course, the policies taken by the government in the face of globalization have also changed (Nurhemi, 2007).

This can allow businesses in one country to compete to gain market access and dominate the markets of other countries, and one of them is vulnerable to export subsidies and import substitution subsidies. (Yulianto Syahyu, 2004) When subsidies are understood in national law, they are a form of assistance provided by the government to domestic

producers, with the aim of improving the domestic economy. (Diphayana Wahono, 2018) However, in international trade activities subsidies are often referred to as a form of fraudulent competition, in this case what often happens is export subsidies which are subsidy instruments given to export goods, or subsidies given to companies or domestic industries whose production will be exported. So in that case it can be understood if export subsidies are feared to cause losses to companies or industries of other countries. (Simatupang, 2008)

In international trade, subsidies are one of the obstacles in the free market mechanism, because subsidies can make domestic goods and services competitive against imported goods and services. Thus, according to the explanation of Pos M. Hutabarat (1999), the decline in prices is not caused by the actions of producers alone, but the governments of producing countries can also help reduce prices through the provision of subsidies, for example, relief of interest rates on capital loans, tax relief or other forms of subsidies. (Hutabarat, 1999) If the granting of such subsidies is understood from a legal perspective, it can cause problems within the scope of international trade.

According to Ida Bagus Wyasa Putra, subsidies may encourage an increase in the output of assisted products but they disrupt the general domestic resource allocation process and have a very adverse impact on international trade. (Putra, n.d.) However, in international trade there are special rules regarding subsidies, namely there is an international agreement or more commonly known as the Agreement on Subsidies and Countervailing Measures. (Administration, n.d.) which in this agreement will regulate in more detail related to subsidies and actions that can be taken by member countries that are disadvantaged due to the existence of export products subsidized by other countries. According to the subsidy agreement described in Article 1 Paragraph 1 of the Agreement On Subsidies and Countervailing Measures, a subsidy is a financial contribution made by the government or a government agency or a private entity designated by the government that involves the direct transfer of funds.

The organization stands under the auspices of the World Trade Organization (WTO) is an international organization that regulates all contents related to international trade, which was formed since 1995 and runs based on a series of agreements negotiated and agreed upon by several countries in the world and ratified through parliament. The purpose of the WTO is to free all barriers to international trade, especially related to the implementation of the lowest tariffs as trade liberalization, as well as to help producers of goods and services, help facilitate exporters and importers in conducting trade therein. (Obalade, 2014)

The basic principles of the WTO itself are (Christophorus, 2017): regional, bilateral and custom union cooperation, general exceptions, anti-dumping and subsidy measures, safeguard measures, sanitary and phytosanitary measures. Therefore, we need to learn more about how the regulation and implementation of subsidies by Indonesia when viewed from the 1995 Agreement on Subsidies and Countervailing Measures. (*SCM*).

The specific subsidy agreements discussed in the SCM are on prohibited subsidies and subsidies that can be imposed and how they are regulated in Indonesia. What is the regulation of subsidies in Indonesia based on the Agreement On Subsidies And Countervailing Measures and what is the content of the agreement related to subsidies in the Agreement On Subsidies and Countervailing Measures?

MATERIALS AND METHODS

This research is a normative legal research approach by analyzing national and international legal regulations. Normative legal research means legal research that places the law as a building system of norms, namely related to principles, norms, rules, laws and regulations, court decisions, agreements and doctrines (Fajar & Ahmad, 2010). As for this research, data collection is carried out using the literature study method by collecting

materials and information in the form of primary legal materials and secondary and tertiary legal materials (Hanitijo, 1991). Primary legal materials are the main legal materials in the form of basic norms and laws and regulations related to this research such as Government Regulation Number 34 of 2011 concerning Anti Dumping Measures, Countervailing Measures, and Trade Safeguard Measures, Agreement On Subsidies and Countervailing Measures 1995 concerning subsidies. Meanwhile, secondary legal materials are obtained through literature studies, namely reading from applicable laws, scientific works, journals, articles, and other types of writings related to the legal issues studied, especially related to international trade subsidies.

Then all data obtained is analyzed through descriptive methods to provide an overview of how the regulation and implementation of subsidies by Indonesia from the 1995-WTO Agreement on Subsidies and Countervailing Measures.

RESULTS AND DISCUSSION

1. Subsidy regulation in Indonesia under the Agreement on Subsidies Countervailing Measures

A subsidy is a payment by the government to producers, distributors and consumers and even the public in certain fields, if understood as a subsidy in trade, it is assistance provided by the state to a company or industry to increase exports and reduce imports. (Adolf & Chandrawulan, 1995) subsidies in Indonesia are an instrument of the state to increase efficiency, growth and development of the economy and become a stabilization function to balance the macro economy in the country. As explained in PP No. 34/2011 on Anti Dumping Measures, Countervailing Measures, and Trade Safeguard Measures. Article 1 paragraph 8 (a) states that a subsidy is any financial assistance provided by a government or government agency directly or indirectly to a company, industry, group of industries, or exporter, (b) any form of income or price support provided directly or indirectly to increase exports or decrease imports from or into the country concerned. (PP No 34 Year 2011 on Anti Dumping Political Measures, Countervailing Measures, and Trade Safeguard Measures, n.d.)

If understood in Indonesia itself, subsidies have a very big influence, especially in the economic world, related to subsidies Indonesia has a policy in providing subsidies can be based on two things, namely: first, to improve the welfare of the people, the second to maintain world peace and order in line with the preamble of the UUD 1945. The planning and distribution of subsidies in Indonesia is organized in the draft state revenue and expenditure budget, where the direction must be clear to whom the subsidy is given.

It can be clearly understood that in Indonesia subsidies are given as long as it is to achieve the welfare of the people, and does not violate the order in the UUD 1945, but in terms of government policy to improve the welfare of the people and protect the domestic economy, it often causes problems in the scope of international trade. Departing from this, the international trade organization is only restrictive, this is done so that in carrying out subsidy actions it does not cause harm to other countries, especially WTO member countries.

Based on the explanation in the government regulation, it is very clear that the subsidy given must be specific to the recipient, for example: for a certain company, industry, group, or group of industries, and given only for the welfare of the people themselves, and does not conflict with international agreements, which are explained in Article 1 and Article 2 of the SCM in which there are three basic elements in determining subsidies so that they are not contradictory, namely: the subsidy given must be a financial contribution from the government or public agency, the subsidy given must provide benefits, the subsidy given must be specific to certain recipients. (*Article 2.1 Agreement*

on Subsidies and Countervailing Measures ("SCM Agreement"), n.d.) as we know that in the world of international trade the practice of subsidies is very detrimental to the economic stability of a country where the practice of subsidies is located (Lusy K.F.R. Gerungan, 2014).

The countervailing measures described in Article 1 paragraph 2 of PP No. 34 Year 2011 on Anti-Dumping Measures, Countervailing Measures, and Trade Safeguard Measures explain that countervailing measures are actions taken by the government in the form of imposing countervailing duties on imported goods which are declared to contain subsidies (PP No 34 Year 2011 On Anti-dumping Political Measures, Countervailing Measures, and Trade Safeguard Measures, n.d.). The purpose of subsidies as explained by Habib Nazir and Muhammad Hassandin is related to the purpose of production subsidies, namely the provision of subsidies to suppliers by the government to encourage them to increase the output of certain products, which aims to expand the production of some products at low prices which are considered very important.

Basically, the WTO has regulated subsidy policies in detail in the Agreement on Subsidies and Countervailing Measures (SCM) explaining that subsidies are prohibited if they involve financial contributions from the government or government agencies of the exporting country, the existence of benefits and are given specifically to certain industries.

2. Contents of subsidy agreements in the Agreement on Subsidies Countervailing Measures

Multilateral trade agreements are a source of international law recognized by the international community, especially members of the WTO, which is an organization tasked with overseeing, operating, and assisting the international trade process. The establishment of the organization is to facilitate trade between countries, namely export and import activities, prosper the global community, and solve international economic problems in accordance with the principles contained therein. As for one of the principles in it, namely the principle of fair competition (fairness principle), to realize fair competition the WTO provides provisions including the provision of restrictions on subsidized export and import products.

The rules regarding subsidies themselves have been regulated in Article XVI of the GATT and are further regulated by the Agreement on Subsidies and Countervailing Measures, which is an international trade agreement under the auspices of the WTO (World Trade Organization), the agreement explains the general definition of subsidies and prohibited subsidies. the types of subsidies allowed in Article 1.1 of the SCM are related to the general definition that will be a reference in determining whether the subsidy is allowed or not in export and import activities.

In Article 1 of the SCM, a subsidy is a monetary or financial gift or contribution made by the government or a public body. The subsidies according to SCM Article 1.1 point a are (WTO, 2005):

- a. *there is a financial contribution by a government or any public body within the territory of a member (referred to in this Agreement as "government"), i.e. where:*
- b. *A government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds-or liabilities (e.g. loan guarantees);*
- c. *Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);*
- d. *A government provides goods or services other than general infrastructure, or purchases*

- e. *A government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.*

Based on the content of Article 1 of the SCM, the government's contribution is as follows:

- a. Direct transfer of funds such as grants, loans, and equity participation, transfer of funds or direct guarantees of debt.
- b. Loss of government revenue from fiscal exemptions such as tax breaks.
- c. Provision of goods or services outside of public infrastructure or purchase of goods.
- d. The government makes payments to a funding mechanism or authorizes a private entity to carry out the government's duties in terms of providing funds.

This explanation cannot stand alone without an explanation in the next article, which is that the subsidy must be "specific" as explained in Article 2.1 of the SCM as follows:

- a. *In order to determine whether a subsidy, as defined in paragraph 1 of article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:*
- b. *Where the granting authority or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.*
- c. *Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulations, or other official document, so as to be capable of verification.*
- d. *If not withstanding any appearance of non-specificity resulting from the application of the principle laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are use of a subsidy programme by a limited number of certain enterprises, the granting of disproportionately large amount of subsidy to certain enterprises and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy, in applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation (Pasal 2.1 Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), n.d.).*

Based on the explanation above, the subsidy in question is a recipient-specific subsidy, i.e. a subsidy given to a company, industry group, or industry group. Based on the explanatory provisions of Article 1 and Article 2 of the SCM, there are three basic elements contained therein, namely (Tylor & Subsidies, 2009):

- a. *Financial contribution by government or any public body*

A financial contribution made by a private entity is considered a "financial contribution by the government" when the government entrusts or directs the private entity to carry out one or more of the specified types of activities as set out in the Article 1.1 SCM.

- b. *Benefit conferred thereby.*

Government financial contributions can only be considered subsidies if they provide benefits. This is generally clear enough in cases where the government gives a sum of money to a company, but it is problematic when the financial contribution is given in other types of terms such as loans, purchase of goods or services, equity infusions and other forms of support. In other words, a "benefit" will arise if the recipient has received the financial contribution as a result of different procedures or easier and more favorable terms from the member state.

In relation to these benefits, Article 14 of the SCM also provides some guidance on calculating the benefits of subsidies that can be received by recipients, among others (WTO, 2005):

- 1) *Equity Capital* provided by the government is not considered to provide benefits if the investment decision is considered consistent with normal investment practices in the private sector.
 - 2) Government loans are not considered as benefits unless there is a difference between the amount the company has to pay for the loan obtained from the government.
 - 3) The provision of goods and services or the purchase of goods by the government should not be considered as the provision of a benefit, unless the provision is made with the effect that there is a favorable aspect of the applicable provision.
- c. Subsidies should be specific

In international trade subsidies do not apply to all types of financial contributions by the benefiting government, except for specific subsidies. Based on the nature of its use, subsidies are divided into 3 (three) categories including the following (Peter Van Den Bossehe, 2008):

1) *Prohibited Subsidies*

A prohibited subsidy is a type of subsidy that is absolutely prohibited in international trade, in which case there is no need to prove the existence of profits or losses in the aftermath. However, subsidies that fall into the category of prohibited subsidies in accordance with Article 3.1 of the SCM are export subsidies and import substitution subsidies. The types of violations mentioned in Article 3.1 of the SCM are due to the act of subsidizing either export subsidies or import substitution if it occurs, it is feared that it will affect international trade and cause losses to other member countries. Subsidies that are prohibited in Article 3.1 are:

a) Export subsidies

According to SCM, an export subsidy is a subsidy granted by the government of a country either in a written or unwritten regulation, either solely or as one of several conditions, the granting of which is linked to export performance. (Administration, n.d.). *This is in accordance with Article 3.1(a) of the SCM, which only applies to de jure or de facto export subsidies.* Annex I of the SCM contains an illustrative list of export subsidies, which includes twelve types of export subsidies (WTO, 2005) as follows:

- a. Direct export subsidies;
- b. Export retention schemes involving export bonuses;
- c. Related to the exemption, forgiveness or deferral of direct taxes and social welfare fees;
- d. Effect of exemption, remission or deferral of indirect tax or import tax

- e. Provision of goods or services for use in the production of export goods on more favorable terms than for the production of goods used for domestic consumption and;
- f. Provision of some form of extended export financing, and interest at a rate below the actual borrowing cost to the government (subject to certain conditions).
- b) Local product subsidies or import substitution subsidies As explained in Article 3.1.b of the SCM, import substitution is a subsidy that is intended solely as one of the requirements is the mandatory use of domestic products (WTO, 2005)
- c) Actionable subsidies

As we know, the SCM regulates subsidies that are prohibited in international trade, but it also regulates the types of subsidies that are not prohibited, but to a certain degree and in cases where it can be proven that they cause harm to other member countries.

As stipulated in Article 5 of the SCM, namely (WTO, 2005) “*No member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of article 1, adverse effect to the interests of other members*”. Article 5 of the SCM describes the basic characteristics of actionable subsidies, which can be submitted by a member state to the WTO member's settlement body, which is determined by the consequences of the subsidy activities carried out by the member state, namely (WTO, 2005):

- 1) WTO member's domestic industry losses
- 2) Elimination or reduction of benefits directly or indirectly for other members.
- 3) Serious threat to the interests of other members.

In actionable subsidies, there is a need to prove the harm caused by the subsidies, and the harm caused by the subsidies received must be caused by similar products. Similar products are determined based on the definition as described in the SCM as follows (Peter Van Den Bossehe, 2008):

Throughout this Agreement the term “like product” (“product similaire”) shall be interpreted to mean a product which is identical, i.e. a like in all respects to the product under consideration, or in the absence of such a product, another product which, although not a like in all respects, has characteristics closely resembling those of the product under consideration.

In terms of similar products can be understood as products that are identical or have the same character even though they are not the same overall, the term similar products is also explained in Article 1, Article III.2 and Article III.4, GATT 1994, which explains that in terms of determining the similarity that exists in products that are considered similar products, it must also look at related elements of similarity, namely; physical characteristics, product functions, habits of consumers, preferences for substitution and tariff classification. (Peter Van Den Bossehe, 2008). As in article II of the agreement on implementation of article IV of the GATT 1994, it explains that similar products are products that are identical in all aspects or if there is no such product, another product, even if it is not identical in all aspects, which has characteristics close to the same as the product under consideration (AK Syahmin, 2006).

Furthermore, Article VI of the GATT, Article 10 to Article 23 of the SCM also regulates the procedures to be taken when a member country considers that subsidies made by member countries have caused harm to the domestic industry of the member country concerned. An example that can be applied in this case is in the case of anti-dumping and countervailing duties, these measures can be applied if the exports are proven to contain subsidies and are clearly proven to have a detrimental impact on the domestic industry.

d. non-actionable subsidies

The subsidies that are not prohibited in international trade are non-specific subsidies. As explained in Article 8 of the SCM in the classification of non-actionable subsidies, namely subsidies applied in certain regions, subsidies related to environmental protection, research and subsidies carried out for development (Peter Van Den Bossehe, 2008).

e. Special provisions for developing countries regarding subsidies in the SCM

Of the many WTO members, some of them are developing countries, which as we know have different economic characteristics from developed countries. This has resulted in inequalities arising between member countries so that the main principle of the WTO, namely mutually advantageous arrangements, cannot be achieved (Juwana, 2001).

The WTO response to the interests of developing countries is through 3 (three) ways, namely:

- a. WTO agreements contain specific provisions on developing countries.
- b. The Committee on Trade and Development (CTD) handles or responds to the interests of developing countries within the WTO. The WTO Secretariat provides technical assistance (generally in the form of various types of training) to developing countries (Directorate of Trade, n.d.).

The different treatment in international trade is known as Special and Differential Treatment (Directorate of Trade, n.d.). It is intended to provide facilities for WTO members, especially developing countries, to implement WTO agreements, thereby stimulating increased participation of developing countries in international trade negotiations.

Article 27.1 of the SCM also explains that in relation to economic development activities subsidies for developing countries can still be treated (WTO, 2005). Article 27.2 of the SCM also explains that the prohibition of export subsidies under Article 3 of the SCM does not apply to developing countries as referred to in Annex VII of the SCM and other developing countries. (*Pasal 2.1 Agreement on Subsidies and Countervailing Measures ("SCM Agreement")*, n.d.).

As per Annex VII of the SCM, developing countries include less developed countries as defined by the UN and countries with a per capita income of less than US\$1000 (*Article 27 (b) SCM*), n.d.). Based on Article 27.2 (b) Other SCM developing countries not included in Annex VII of the SCM can only subsidize exports for a certain period of eight years (*Annex VII SCM*, n.d.).

According to Article 27.4 of the SCM, developing countries must phase out export subsidies within eight years of the conclusion of the WTO Agreement.

The elimination of these subsidies must be done progressively. To the extent that a developing country under Article 27.2 (b) of the SCM is unable to increase the amount of subsidies provided in the event that the development activity does not require the provision of export subsidies, the developing country must eliminate the export subsidies within eight years (*Article 27 (b) SCM*), n.d.).

Developing countries may extend the term of their export subsidy designation, if necessary the extension must be notified to the committee on subsidies and countervailing measures (SCM committee) one year before the end of the eight-year period.

CONCLUSION

Conclusions should, rather than just repeating results, state well-articulated outcomes of the study and briefly suggest future lines of research in the area based on findings reported in the paper.

In this journal, the regulation and implementation of subsidies in Indonesia is in the form of financial assistance provided by the government either directly or indirectly to companies, industries, industrial groups or exporters and any form of support for income or prices provided directly or indirectly with the aim of increasing export activities and reducing import activities for the welfare of the people and not violating the provisions of the UUD 1945, as defined in the PP. Number 34 of 2011 concerning Anti-Dumping Measures, Compensation Measures and Trade Security Measures Article 1 paragraph 8..

Agreement On Subsidies and Countervailing Measures (SCM), is an international trade agreement under the auspices of the WTO (World Trade Organization), this agreement contains a general definition regarding prohibited subsidies and subsidies. In Article 1.1 of the SCM, the general definition of a subsidy is a gift or (contribution) in the form of money or finance provided by the government or a public body. Subsidies are divided into 3 (three) categories, namely:

- a. Prohibited subsidies
- b. Actionable subsidies
- c. Non-actionable subsidies

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