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The US Anti Dumping and Anti Subsidy Investigation on Biodiesel Originating from Indonesia



On the 31st of March 2017, as a follow up to his campaign promises, US President Donald Trump signed 2 (two) executive orders aimed at maintaining the US' trade balance. President Trump promised to stop the unfair trade practices conducted by countries exporting to the US. Indonesia is alleged to be one of these countries.

The direction of this policy was already apparent even before the executive order was signed. On the 23rd of March 2017, the US Department of Commerce (DoC) and the US International Trade Commission (ITC) initiated the Anti Dumping and Countervailing Duty Investigation on biodiesel imported from Argentina and Indonesia. This investigation was based on a petition filed by an ad hoc association which made up of the National Biodiesel Board and 15 (fifteen) domestic producers who collectively account for the majority of biodiesel production in the US.

The US claims that Indonesia conducts unfair trade practices, which are condemned by international trade laws, as agreed upon in the General Agreement on Tariffs and Trade (GATT). More specifically, the US-initiated investigation falls under the provisions of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which is commonly referred to as the Anti Dumping Agreement and the Agreement on Subsidies and Countervailing Measures, which is commonly referred to as the SCM Agreement. As members of the WTO, both Indonesia and the US have ratified those agreements and therefore are bound by both agreements.

Anti Dumping

In this investigation, the US claims that Indonesia has exported biodiesel at dumping prices, which is prohibited under the Anti Dumping Agreement. More specifically, the US alleges Indonesian exporters or producers have sold biodiesel in the US at lower prices than for sales of biodiesel in Indonesia, which causes injury to the biodiesel industry in the US.

According to the initial calculations presented as *prima facie* evidence in the petition that serves as the basis of this investigation, the dumping margin – the margin between the selling price of biodiesel originating from Indonesia in the US and in Indonesia – is alleged to be 34% (thirty four percent). This dumping margin will continue to be examined throughout the investigation.

During the investigation, the DoC will investigate 2 (two) Indonesian companies with the biggest volumes of exports to the US by submitting various questions regarding their selling price, production costs, and other matters considered relevant in this investigation. These companies' cooperation is very important, as when the DoC fails to obtain sufficient information, they are allowed to use the best information available, which often results in very high dumping margin.

Aside from the examination of the dumping margin, the ITC will have to prove the existence of injury in the American domestic industry and the causal link between the dumping and such injury.

The dumping margin found will be the basis of the anti dumping import duty (ADID) rate imposed on imports to the US of biodiesel originating from Indonesia. This ADID rate will be added to the currently applicable import duty rate for biodiesel, and will be in force for a period of up to 5 (five) years, which can be extended.

Individual ADID rates may be imposed on the 2 (two) Indonesian companies with the biggest volumes of exports to the US, while ADID rates which are based on the dumping margin calculated for the investigated companies under investigation will be imposed on other companies.

Countervailing Measure

In conjunction with the anti dumping investigation as explained above, the US is also conducting a countervailing measure investigation otherwise known as an anti-subsidy investigation. With the initiation of this investigation, the US claims that the Indonesian government has provided subsidies in relation to biodiesel exports which has lead to injuries to the American domestic biodiesel industry.

One of the subsidies that is claimed to have caused injuries, according to the petition is the biodiesel subsidy program. Apart from that, the crude palm oil (CPO) export limitation is also mentioned as a form of subsidy given by the Indonesian government which benefits biodiesel producers.

Quite apart from the above, financing and insurance facilities, such as the financing provided by Indonesia Eximbank, insurances provided by PT Asuransi Asei Indonesia, and export guarantees provided by Indonesia Eximbank and PT Asuransi Asei Indonesia are also facilities that are being scrutinized by the US government. Moreover, industrial zone subsidies and various tax facilities, such as the pioneer industry tax facility and the income tax facility for listed investments are also cited as forms of subsidy directed to biodiesel producers.

With regard to those claims, the DoC will conduct various examinations of the subsidies enjoyed by biodiesel-producing companies, especially the 2 (two) Indonesian companies with the largest volumes of exports of biodiesel to the US. Based on the results of to this investigation and subject to the injury examination conducted by the ITC, the US government may impose import duties in accordance with the subsidy calculation. This import duty is known as the countervailing duty (CVD). As is the case with ADID, the CVD is also imposed on top of the current import duty and is in force for 5 (five) years, which can be extended.

Possible Actions for the Investigation

The imposition of additional import duties, whether in the form of ADID or CVD, will be disadvantageous for Indonesian biodiesel producers, who frequently export their products to the US. This will certainly have an adverse effect on Indonesia's trade balance. Therefore, the process of proving dumping (in connection with the anti dumping investigation) and subsidies (in connection with the countervailing duty investigation), injury, and the causal link between them is very crucial.

With regard to evidence of dumping and subsidies, biodiesel producers, especially the largest exporters to the US have to cooperate in this investigation. The producers will have the opportunity to prove that they do not practice unfair trade, i.e. dumping, in the US. At the same time, to ensure that the CVD is not imposed, these producers will have to show that there is no or a very small subsidy granted by the Indonesian government. The DoC carries out the investigations on the dumping margin and the subsidy.

In addition to the examination of the dumping and subsidy elements, another important examination process is directed towards the injury to the American domestic industry carried out by the ITC. In this investigation, the producers, producer association and/or the Indonesian government through the Ministry of Trade has to file responses that deny the injury and the causal link that may be the basis for the imposition of ADID or CVD. The Indonesian government, specifically the Ministry of Trade, as an interested party in this investigation, is in the perfect position to submit rebuttals to the ITC regarding the injury and causal link analysis. Therefore, to ensure that the rebuttals submitted are advantageous to Indonesia's defense in this case, it will be highly beneficial to appoint legal representatives or counsel who are not only experts in the field of international trade law, but also have sufficient experience in dealing with and access to the ITC.

In conclusion, cooperation from various interested parties, namely producers, the producer association and the Indonesian government is of great importance in Indonesia's defense in this case.

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