TPSA | CANADA–INDONESIA TRADE AND PRIVATE SECTOR ASSISTANCE PROJECT

Session 6:

SELECTED INDONESIAN TRADE REMEDY CASES

Bogor, Indonesia, 17-19 July 2017

Erry Bundjamin
Founding Partner, Bundjamin & Partners

Canada
Program undertaken with the financial support of the Government of Canada provided through Global Affairs Canada

Project Executed by:
The Conference Board of Canada

Partner:
KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA
MINISTRY OF TRADE

Part I

Cost adjustment and profit determination in EU's imposition of anti-dumping duty on import of Biodiesel (Indonesia)

TPSA
Canada
KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA
MINISTRY OF TRADE

Background for cost adjustment

-EU initiated AD and CVD investigation on import of biodiesel from Argentina and Indonesia;

-CVD investigation was based on the allegation that differential export tax on crude palm oil (CPO) and its derivative constituted countervailable subsidy was terminated due to withdrawal from the complainants;

-After the termination of the CVD investigation, at the definitive stage, the EU make cost adjustment for the establishment of NV of the Indonesian biodiesel producer based on international reference price (also for Argentina) by the reason the DET distorted the price of CPO and soybean leading to artificially low price as the feedstock for biodiesel;

-The result of the cost adjustment is the inflation of dumping margin for Indonesia and Argentina producers.

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Key Factors

On 6 October 2016, the WTO AB issued the report (DS 473) which upheld "as applied" claim of the Argentina that:

"the EU acted inconsistently with Articles 2.2.1.1 and 2.2 of the WTO Agreement (market distortion to replace the cost and, information outside the country of origin)"

However, the WTO AB found that EU did not violate "as such" of Article 2.5 in relation to Article 2.2.1.1 the WTO ADA.

The AB's Interpretation of Articles 2.2.1.1 and 2.2 of ADA as well as application of the AD measures established standards and rules to be observed. Thus, DS 473 has profound implications for the AD investigations on adjustment of input costs

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Analysis on the AB Findings

Article 2.2.1.1 of ADA

- **Article 2.2.1.1**

"For the purpose of paragraph 2, ***costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration***."

The AB's Reasoning:

(1) Meaning of the provision concerned "costs associated with the production and sales":
(a). Records of an exporter/producer is based on costs of specific exporter/producer; (b). product under investigation refers to a product subject to the investigation; (c). Costs recorded is reflection on facts or events incurred before; and costs mean price paid for things.

(2) As for the contextual aspects
two conditions set for the first sentence:

-First condition: comply with GAAP, but not necessarily leads to compliance with second condition;

-Second condition: record reasonably reflects costs relating to *specific* product under the investigation;

Recorded costs must have a *genuine relationship* with the costs of the production and sales;

Costs that bear no relationship with the ones in the country of origin or recorded costs cannot be used as standards for assessment to arrive at findings.

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Continue

2. Implications

- Costs must be the ones incurred by an exporter/producer subject to the investigation
  - Not costs incurred by producers in other country;
  - Not hypothetical costs in a hypothetical market that should have happened to adjust so-called "artificially low" costs, and this would lead to "hypothetical costs", not actual costs.
- Genuine relationship and specific product excludes the factors and/or considerations on the basis of market distortion by governmental measures/regulations. Costs must be what are actually incurred and reasonably reflect for the production and sales under investigation.

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Continue

Article 2.2 of ADA

- **Article 2.2 of ADA**

the AB Reasonings:

Meaning of the provision concerned, the AB states that:

"Cost in the country of origin has to be prices paid or payable for products to be produced in the country of origin;"

It does not exclude the possibility to consider information/evidence (as opposed to costs themselves). However, based on the meaning of "country of origin", any information/evidence obtained outside the country of origin shall be "adapted" to the costs in the Country of Origin .

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Continue

- The fact is that EU failed to adapt such reference price without reflecting Argentina domestic prices.
- The AB imposed a strict conditions on using information/evidence outside of COO; burden of proof is rested with the IA.

2. Implications

（1）The AB imposes the obligations of the authorities to adapt outside information/evidence to to ensure it reflects the cost in the country of origin;

（2）The AB did not set out methodology but stressed on the obligations ***to disclose reasoned explanations as regard how to derive such costs to be compatible with the ones in the country of origin***;

（3）The AB also limited the application of "outside" information/evidence under strict and narrow circumstances;

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Claims relating to "as such"

- **Articles 2.2.1.1 and 2.2 of ADA**

Reasoning

Argentina claimed that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement by providing that the authorities shall reject or adjust the cost data of the producers/exporters as included in their records when those costs reflect prices which are "abnormally or artificially low" because they are affected by an alleged distortion.

The Panel rejected Argentina's claims stating that that the provision being challenged ***prescribes what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production, and does not govern the determination of whether those records reasonably reflect the costs of production, as Argentina had alleged.***

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Profit Determined by the EU

Article 2.2.2 (iii)

"For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Profit Determined by the EU

EU established the profit used to CNV is 15% based on:

-The profit established on the EU Biofuel AD investigation on the US;

-Profit of borrowing rates;

-Profit of new industries in the EU

EU-Footwear Panel Report VII.299

Turning to the second question first, it is undisputed that the Commission not only did not calculate the cap established in Article 2.2.2(iii), it made no attempt to do so. The European Union asserts that the necessary data for calculating the cap was not available in this case, and suggests that this entitled the Commission to ignore this requirement. In any event, the European Union contends that the requirement of a "reasonable method" nonetheless constrained the Commission's decision

VII.300

Given that it is undisputed as a matter of fact that the Commission did not determine "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", it is apparent that the Commission could not, and did not, ensure that the amount for profit it established for Golden Step did not exceed this level.

→ The EU did not determine the cap of the profit on the product of the same category in the country of origin

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Part II

Single economy concept entity in EU's imposition of anti-dumping duty on import of Fatty Alcohol (Indonesia)

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Background

-EU initiated AD investigation on Fatty Alcohol (FOH) Among Others from Indonesia;

-Indonesian companies' export practice is through Singapore;

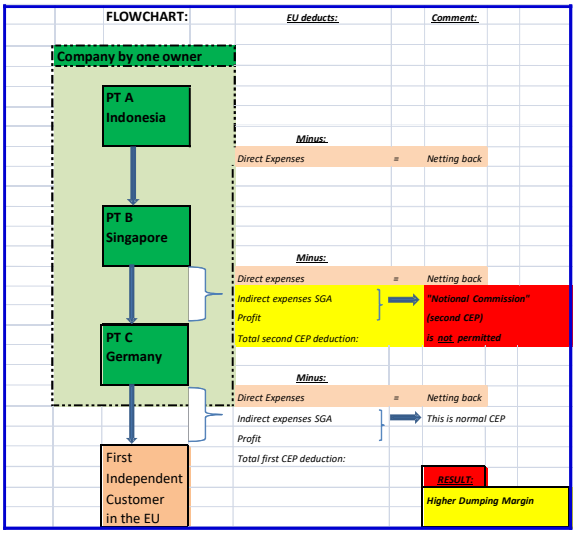
-In the case of FOH there is related trading companies in the EU too;

-Based on the above sales structure the EU constructed the export price of the Indonesian producers to arrive as the price to the first independent buyer in which the EU deducted profit and SG&A at the EU and Singapore level resulted in finding of margin;

-Single Economy Entity was contested: one of the Indonesia producers and its related marketing company in Singapore and Germany was finally regarded as a single economic entity and thereby only profit and SG&A incurred in Germany was deducted from its export sales to the EU.

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Double deduction flow-chart



TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Reasons for the EU to not regard the Indonesia producers as Single Economic Entity:

1. Some export sales to third countries made directly by the companies;
2. The related company (trading) in Singapore also sold products sold by other producers;
3. There was a commission stated in the contract between the Indonesian company and its related trading company in Singapore

Canada

The EU case laws:

- Judgment of CFI in *Interpipe* (Case T-249/06):
  - "*Existence of a single economic entity between a producer and a distribution company precludes making an adjustment for a notional commission pursuant to Article 2 (10) (i) basic Regulation.*"
- Council and Commission admitted on appeal before the ECJ that existence of a single economic entity precludes an adjustment for commission
- Advocate General essentially confirmed the Judgment of the CFI in *Interpipe*
- Absence of a deduction of a notional commission is also reflected in past practice (*Aluminium Road Wheels*, *PTA*, *Sodium Cyclamate*, etc).

Canada

- Since the 1984 *Typewriters* case it is established practice that:
  - *The fact that they are legally separate entities does not alter the existence of a single economic entity. What is relevant is not the legal structure but the fact that the principal function of these sales companies is to sell or to facilitate the sale of the corporate product, that they are either wholly owned or controlled by the corporate entity, or that there are strong links with respect to management personnel and staff."*
- The Advocate General stressed the importance of the capital structure to determine whether there is a single economic entity in *Gao Yao* (Case C-75/92)

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Continue

- Article 2.3 ADA:

"In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine."

- Article 2.4 ADA

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Continue

In DS 442:

the Panel found no legal basis in the text of the Anti-Dumping Agreement for Indonesia's claim that costs incurred within a single economic entity could not be deducted in the process of calculating the dumping margin of a product. It ruled that the existence of a close relationship between the producer and the trader was not dispositive of whether a payment could be treated as a factor affecting price comparability.

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Continue

Based on the Panel report on DS 442:

1. **Single Economic Entity does not necessarily dispositive to price comparability;**
2. **Deduction is still possible as long as there is demonstrable fact of cost that affect price comparability**
3. **Single Economic Entity is recognized by the EU practice with some discretionary power to determine;**

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Part III

Some aspects on recent Indian anti-dumping investigations against Indonesia

Canada

Background

- India is one the most active users of trade remedies and aggresive against Indonesia;
- The current on-going Anti-dumping investigations against Indonesia are:
  - -Fatty Alcohol;
  - -Non Woven Fabrics;
  - -Wooden Flooring;
  - -PSF;
  - -Ammonium Nitrate;
  - -Glassware.

Canada

Some Interesting Aspects

1. Indian AD laws exclude Indian producers who imported the product under investigation or producers who are related to the importers;
2. The allegation on material retardation on some investigations including the on-going non-woven fabrics;
3. There is only one form of questionnaire applies to all investigations;

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Material Retardation

Artcle 3 footnote 9 of ADA:

" Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or ***material retardation of the establishment of such an industry*** and shall be interpreted in accordance with the provisions of this Article."

No established WTO case law on material retardation. Indian Authority has applied material retardation in some of its investigations/

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Material Retardation

In Final Findings DGAD concerning imports of fused magnesia from (1999):

"*The petitioner has set up a plant for manufacturing sintered sea water magnesia. The project to set up the plant was at an advanced stage of completion at the time of initiation of the investigations*. The landed price of fused magnesia from China PR in the investigation period is significantly lower than the fair selling price which the petitioner is expected to recover. It is appreciated that there was a significant delay in the implementation of the project by the petitioner resulting in significant increase in its interest liability. The petitioner is, however, entitled to recover its interest costs as projected in its project feasibility. While considering only this interest cost, fair cost of production of sea water magnesia and fair return on the funds employed by the petitioner, the petitioner would not have been able to recover its cost of production and would have suffered significant financial losses. *The establishment of the domestic industry would, therefore, be materially retarded by the dumped imports from China PR."*

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Material Retardation

In on ongoing case on Non-Woven Fabrics, the data shows as follows:

Particulars	Unit	Jul-15	Aug-15	Sep-15	Oct-15	Nov-15	Des-15
Capacity	MT	100	100	100	100	100	100
Production PUC	MT	100	95	143	663	227	574
Capacity Utilization	%	100	95	143	663	227	574
Production NPUC	MT	***	***	***	***	***	***
Plant Production	MT	***	***	***	***	***	***
Plant Utilization	%	***	***	***	***	***	***
Sales volume	MT						
Domestic	MT	100	130	241	543	570	781
Captive	MT	-	-	-	-	-	-
Export	MT	***	***	***	***	***	***
Total Sales	MT	***	***	***	***	***	***

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Continues

Recital 141 of the non-confidential petition:

" WTO Jurisprudence on the meaning of material retardation and how it should be examined is explained below. While the test of material injury or a threat of material injury can be applied to an existing domestic industry, in the case of domestic industry yet to be fully established, the test to be applied is that of material injury to the extent of existence and material retardation to establishment of industry. The following two conditions are relevant where the test of material retardation may be applicable:

i) In case of "developing industry" which has not yet begun commercial production but substantial commitment to commence production has been made;

ii) In case of "nascent industry" whose commercial production although has begun but the industry yet to find its place in the market"

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Continues

It is clear from the above that:

- The Applicant is not a "nascent industry" but an established company, because it is clear from the data that the applicant has been experiencing positive performance of actual production and sales in the period of investigation from July to December 2015. Thus, it proves that the import product did not retard the establishment of domestic industry;
- Second, since an industry should be seen as collective companies, it is proven that non-woven fabric industry in India has been existing for years. For example Ahlstrom Fibre Composites India Pvt. Ltd, is a domestic industry which has been operating since 2012;
- Finally, material retardation within the nascent industry concept is totally unacceptable in this investigation as the applicant has indeed stabilized their sales and production and sales.

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Unique case in FOH

Problem with Period of Investigation (POI):

- The proposed POI by the applicant for determination of dumping as presented in the non-confidential complaint (NCC) was April 2015 to June 2016 (15 Months);
- However, the DGAD decided not to use that proposed POI by the reason that during that period the application was 100% Export Oriented Unit (EOU). The DGAD in the notice of initiation (NOI) otherwise determined that the POI for dumping is 1 April 2016 to March 2017;
- **As a consequence, Indian DGAD requested the petitioner to revise its petition by the new IP;**
- **The problem arising from the above situation:**

-No prima facie evidence of dumping, injury and causality as required by Article 5.2 of ADA in the new IP

-Since the petitioner was 100% EOU for the proposed IP, under Indian law, it is possible that the petitioner is disqualified from the petitioner;

- **The DGAD should have terminated the investigation then reinitiated a fresh investigation based on the IP it determined**

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Lesson Learnt

- There is a potential inconsistency by the Indian authority for the application of material retardation on non-woven fabrics;
- A need for the WTO, possibly through Ministerial Meeting, to elaborate the understanding of material retardation;
- The rejection of the proposed IP by the DGAD and its introduction of the new IP without the presence of prima facie evidence of dumping, injury and causality would be inconsistent with Article 5.2 of ADA

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Part IV

Important elements for Indonesian trade remedies laws in the future

Canada

Important Notes

- Transition period for the implementation of Trade Law has passed. It is expected a major change in Indonesia trade remedies regulations in the near future;
- Currently Indonesia's trade remedies still refers to Government Regulation 34/2011;
- Indonesia is the No.2 user of SG measures in the world and No. 12 for Anti-Dumping (WTO data 2009-2014).

Canada

Continue

- Indonesia is a member of ASEAN; ASEAN members have signed a free trade agreement with China (CAFTA) where most of products trade between parties are subject to low or zero tariffs;
- China is considered a Market Economy by Indonesia ➔ relatively low anti-dumping duties (ADD) against Chinese products;
- No zeroing methodology applied of high ADD;

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Some propose amendment and/or inclusion of provisions

- Article 13 of the AD Agreement provides as follows:
- *Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question."*

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Some propose amendment and/or inclusion of provisions

Article 99 of Government Regulation No. 34/2011 provides for objection to the imposition of trade remedy measures as follows:

- Objections against the imposition of anti-dumping duty, countervailing, and safeguard measures may only be filed with the Dispute Settlement Body of the World Trade Organization.
- Objections against the implementation of anti-dumping, countervailing, and safeguard measures during importation shall be filed based on the prevailing laws and regulations."

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Some propose amendment and/or inclusion of provisions

- Article 99 of GR 34/2011 would not be consistent with Article 13 ADA;
- Indonesia needs to establish independent tribunal/court to deal with objection of anti-dumping measure: attached to commercial court or administrative court

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Some propose amendment and/or inclusion of provisions

Article 1,17 of GR 34/2011 and MOT Regulation No. 76/2012 clearly provides as follows:

*Domestic Industry, in the context of Anti-dumping Measures or Countervailing Measures, is all domestic producers of like products or cumulatively a major proportion of the total domestic production of the like product, **not including the following**:*

a. ***domestic producer of like product afiliated with exporter, exporter/producer, or importer of dumped goods or subsidized goods***
b. ***Importer of Dumped Goods or Subsidized Goods**." (emphasis added)*

TPSA Canada

Continue

- Article 4.1 WTO Anti-Dumping Agreement:

For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

*(i) when producers are related11 to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" **may be interpreted** as referring to the rest of the producers;*

TPSA Canada

Some propose amendment and/or inclusion of provisions

- Article 1.17 of GR 34/2011 is stricter than Article 4.1 ADA
- More stringent requirement for Indonesian industry to be qualified as the domestic industry
- Good to be consistent with Article 4.1 of ADA

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Some propose amendment and/or inclusion of provisions

- Clarified provision on sunset review, interim review and new comer review is necessary
- Needs to consider adoption of provisions of ADA such as determination of dumping under Article 2 and injury under Article 3 of ADA;

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

Some propose amendment and/or inclusion of provisions

- Provisions on CVD and anti-circumvention have to be carefully drafted.
- It is suggested to refer to the EU or US system for anti-circumvention and to adopt the WTO ASCM Agreement for CVD

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE

THANK YOU

TPSA Canada KEMENTERIAN PERDAGANGAN REPUBLIK INDONESIA MINISTRY OF TRADE