

Cigarette:

The GATT non-discrimination clause

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Abstract—This article seeks to understand how dispute occurs between Indonesia and other countries (i.e. Australia and the United States of America) concerning the clove cigarettes, which involves the cigarette company from Indonesia. Using an interpretive-inductive research method, we draw on cases studies from international dispute settlement to understand how the international trade takes place. The results indicate that dispute settlement system allows the developing countries to transform the diplomatic resolution of the case with legal guidance to a quasi-judicialized system to avoid “trade wars”.

Keywords—dispute settlement; cigarette; anti-discrimination principle

I. INTRODUCTION

The tobacco industry does not like to be regulated, primarily the developing countries. The legal and political systems of a country play a pivotal role as large-scale institution, which foster income growth through which this happens is trade and exports [1]. Most of the challenges come informal complaints expressed in the least costly venue, that of the world trade organization (WTO) committees where tobacco industry among the subsistence stakeholders increased [2].

The WTO’s dispute settlement system (DSS) has become a success story from several points of view including the great number of disputes that are brought to the system. This evidence has brought the confidence that members of the WTO have in the usefulness and the efficiency of the system [3]. The traditional focus of the WTO has been on increasing market access and eliminating discrimination in trade [4].

The WTO members would interact within the multilateral framework of international law, commit to dispute resolution procedures, conflict prevention, transparency, and respect for human rights. In fact, global business environment turbulence has brought lack of respect international law, and armed, nonstate actors exert their own influence across national boundaries. The political events of all magnitudes continually impact the world economy [5].

When a country seeks to protect from the international trade, it can choose a number of measures that can be classified as either tariff or non-tariff measures. Technical barriers to trade (TBTs) is a large set of measures including certification

guidelines, performance mandates, testing procedures, and labeling requirements designed to contribute to consumer safety, environmental protection, national security, product interoperability, and other goals [6]. Hence, the tobacco industry relies on economic arguments of potential negative impacts of tobacco regulation on international trade to convince governments, primarily in developing countries, against implementation of effective tobacco control measures [7].

The specific factor model demonstrates how a sector-based approach is related to the political economy of international. Both the Heckscher-Ohlin model and its Stolper-Samuelson theorem argue that factors of production such as labor, physical capital, and land can move effortlessly among different sectors of trading economies [6]. While the law guarantees or at least suggests a level playing field in a rules-based trading system, changes in the political landscape of some of the strongest global economic powers are clear indicators that the field may not stay level if indeed it ever was [5].

The WTO dispute settlement system has worked quite well, not least in terms of allowing developing countries to use the system, switching from diplomatic resolution of cases with legal guidance to a quasi-judicialized system, fending off (too much) protectionism and avoiding “trade wars”, less is known about the exact nature of compliance than is usually inferred from official statements. More scholarly work would be welcome to fill this particular gap and allow us to better understand the nuances of the concept of compliance [5]. The question is why capitalists with a capital-abundant country oppose increased trade in violation of the Stolper-Samuelson theorem. [6].

II. RESEARCH METHOD

This study used interpretative-content analysis which allows the researchers to interpret the documents that provide the information. The purpose of content analysis is to identify the common knowledge in previous studies and contribute to the understanding of international expansion of firms in developing countries [7]. This approach incorporates coding content into themes similar to how to analysis the interview transcripts [8]. Content analysis in subject matter categories has

been applied to a wide variety of document analysis, such as textbooks, speeches, and print advertising [9].

After data collection, the researchers divided the data into distinctive meaning units to investigate the phenomena in the observed communities. Hence, the analysis concerns to manage these fragments into categories following an interpretive process in which the researcher tried to use category labels, which were close to the original language of participants. The theoretical sampling involved comparison of concepts articulated by findings [10].

III. FINDINGS

A. Cigarette in Australia

In the early 1970s, tobacco was one of the most heavily advertised commodities. Since September 1973, the Government announced the banned direct advertising of cigarettes followed by banning the advertising in print media, outdoor, and through sponsorship. In 1999, several states limited the number of packs permitted [11]. In 2011, the Australian Government enacted legislation requiring tobacco manufacturers to adopt 'plain packaging', a government-mandated design standardized across all brands of tobacco products [8].

The literature shows that the impact of health warnings depends upon their size and design: whereas obscure text-only warnings appear to have little impact, prominent health warnings on the face of packages serve as a prominent source of health information for smokers and non-smokers, can increase health knowledge and perceptions of risk and can promote smoking cessation [9].

Standardized packaging or commonly known as plain packaging, is a plain and homogenous packaging which means that the usual packaging which has had promotional aspects of tobacco products removed from it. The appearance of the tobacco product packaging includes the package color. This approach attempts to eliminate the influence of color variation on marketing approach. The comprehensive warnings tend to be effective among youth and may help to prevent smoking initiation. Pictorial health warnings that elicit strong emotional reactions are significantly more effective [10].

In response, plain packaging policy in Australia has faced multiple challenges from a global, well-resourced industry able to use all available fora to seek redress. In April 2015, the World Trade Organization Dispute Settlement Body established two more panels in a dispute against Australia's plain packaging for tobacco products, bringing the total to five. Those who were against are Ukraine, Honduras, Dominican Republic, Cuba, and Indonesia. The countries that complaint against Australia's legislation on plain packaging for tobacco products argue that Australia should abide its international trade obligations regarding intellectual property rights in particular trademarks and geographical indications [8].

The Dominican Republic's statement said to the DSB was "we fully shares Australia's health objectives, but considers that its plain packaging measures fail to have the desired health effects of reducing tobacco industry, then it means that the

plain packaging is not only an ineffective health policy, but on the other hand, it is also something that could damage fair competition in the marketplace. Therefore, it was inconsistent with Australia's obligations under the WTO Agreement on TRIPS and the Agreement" [9].

Australia mainly focused its statement on the harms of tobacco and the importance of combining the various disputes. It repeated its particular concern over the precedent-setting 16 months between the Dominican Republic's first panel request and its second one on 25 April 2014 when the panel finally established. In the case of the Cuba, Australia focused on the harms of tobacco in Latin America and the Caribbean and its apparent inconsistency with Cuba's strong record on public health. Meanwhile, several countries have expressed their intention to adopt similar mandatory on tobacco products, including plain packaging, such as New Zealand and Ireland. In its statement, New Zealand repeated its support for Australia's position. Not only involving WTO, this plain packaging for tobacco products also involved the World Health Organization as it is publicly supporting plain packaging for tobacco products.

In December 2011, Nicola Roxon, Australian Minister for Health and Ageing said: "We know that packaging remains one of the last powerful marketing tools for tobacco companies to recruit new smokers to their deadly products, but now cigarette packets will only serve as a stark reminder of the devastating health effects of smoking." [11].

In response to the plans, the tobacco industry launched a lobbying campaign, using many of its well-established tactics, listed on our Plain Packaging and Industry Arguments Against Plain Packaging pages. Australian newspaper The Sydney Morning Herald reported that British American Tobacco (BAT) Australia had spent AUD 4.5 million (almost £3 million) on its campaign against plain packaging. It infringes International Trade Agreement, if WTO let this case win in the favor of Australia, the opposing country might also impose a plain packaging for wine from Australia, as it is alright for tobacco to have plain packaging, the reason could also be similar, consuming lots of wine is not good for body. In 2010, the Australian tobacco firms set up the Alliance of Australian Retailers (AAR) with support from the industry.

Guidelines for Implementation of Articles 11 and 13 of the WHO recommends that Parties consider adoption of plain packaging. Parties who opposed Australia's legislation used the law as their offensive base: Australia breaches intellectual property (IP) rules under the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement and violates the Agreement on Technical Barriers to Trade (TBT). In Australia, a study found that since standardized packaging was introduced, smokers' support for the measure rose sharply from 28.2% prior to its introduction to 49% after implementation (ash.org.uk), they said that plain packaging or not doesn't really matter as after use it, they'll throw the case anyway. With or without logos or differentiation won't make smokers stop to smoke, the only reason smoker stop smoking is their little princess.

On the other hand, countries that oppose this regulation, got big tobacco industry backed them up such as: Imperial

Tobacco Australia, British American Tobacco Australia and Philip Morris Limited. In June 2011, the Head of Corporate Affairs for Imperial Tobacco in Australia, Cathie Keogh, appeared on Australian radio to attack the government's plans on plain packaging.

Australia's legal bill for defending its cigarette plain packaging legislation is set to hit \$50 million as it battles to contain a case brought by tobacco giant Philip Morris. British American Tobacco (BAT) Australia had spent AUD 4.5 million on its campaign against plain packaging. Australia is the only country that currently impose upon the regulation of plain tobacco packaging, as a result of laws that were enacted in 2012. As is known on 21 November 2011, Australian Parliament passed the government's proposed plain packaging legislation, they sought to limit the sale of cigarettes and tobacco products in the country by issuing the rules contained in the Tobacco Plain Packaging Act. Under these laws, all cigarettes and tobacco products manufactured since October 2012 and marketed since December 1, 2012 shall be packaged in plain packaging without including colors, images, logos and slogans product.

The Australia Government will be the one who get benefit from it, as they seek 'cost-benefit analysis' on plain packaging for cigarettes. It appears that this case is not a play set up by two giant tobacco industry, as they also fight against plain packaging in several countries beside Australia. And if these tobacco industries do not fight against the regulation, their profit might decrease significantly. Up till now, a decision has not been reached between both parties (complainant countries and Australia) which mean that possible compromise should be made.

B. Cigarette in the USA

The United States of Food and Drug Administration (FDA) enforced a ban on all flavored cigarettes on September 22, 2009. This included any cigarette containing flavor other than menthol - Sweet Dreams Cherry, Vanilla, and Chocolate, and all clove cigarettes. The FDA enacts the Family Smoking Prevention and Tobacco Control Act. Under the provisions of this act, it is illegal to sell or import any flavored cigarette, flavored cigarette tobacco, or flavored cigarette paper. The people are, however, allowed to smoke any such products which were purchased before the ban.

The new law was categorized into the Family Smoking Prevention and Tobacco Control Act, which regulated the sale of any flavor cigarettes, as it prohibits the flavor cigarettes from being sold. All flavor cigarettes were not allowed to be sold, however menthol cigarettes are not included in the criteria in the new regulation. In other words, the new law by United States ban all the sales and the production of all kind flavored cigarettes, with the exception of menthol cigarettes.

As one of the largest exporters of the cigarette products to the United States cigarettes market, Indonesia feels that they are disadvantaged from this new regulation. Soon, Indonesia sounds their objection towards the new law that already take place, because Indonesia thinks it has a potential to discriminate the clove cigarettes exported to the United States market. In the other hand, as the regulation only prohibits

flavor cigarettes whereas menthol cigarettes are not included in the category, Indonesia argued that this may give advantage towards the menthol cigarettes, which is actually unfair.

The root cause is that all cigarettes that have flavors are banned from the sales in the market unless menthol cigarettes; nevertheless, Indonesia thinks that actually the menthol cigarettes should be included in the criteria of the flavor cigarettes, are not. Therefore, the menthol cigarettes are still allowed to be sold in the market and no ban action will be applied on it.

The main reason behind the complaint from Indonesia is that they believe that actually the new act will imply discrimination towards the products of Indonesia. Banning the clove cigarettes in the United States market, while allowing the menthol cigarettes to be sold is one kind of discrimination of products from Indonesia, thus United States does not fulfill their obligation to avoid a fair without discrimination trading practices since United States is registered as one of the members of the World Trade Organization as well.

Regarding the anti-discrimination principle, Indonesia knows that actually the clove cigarettes (that is in the category of cigarettes with flavor) sold in the United States are imported, and Indonesia is the primary exporter of it; whereas the menthol cigarettes sold there is produced from local manufacturer. United States does not import menthol cigarettes from Indonesia.

To respond against the act applied by United States, Indonesia started their dispute resolution process through the World Trade Organization body a year later (2010, April 7th) by applying for request for consultation with the United States delegation. As one of the members of World Trade Organization, then Indonesia have the rights to claim a settlement through the help of the largest trade organization in the world. Two months later after Indonesia filed an objection and request for consultation; the Panel body establishment is requested by Indonesia through the Dispute Settlement Body that is in the authority of the World Trade Organization.

The establishment of the Panel itself is intended by Indonesia to review or to decide the application of the new regulation that starting to take place in September 2009 in the United States. During the consultation and Panel body establishment, Indonesia presume that section 907 in the new FDCA regulations violates the GATT Article III: 4. The base of assumption used by Indonesia that time is that both menthol and clove cigarettes are "like products"; as the ban is only applied on clove not menthol cigarettes, then there is violation regarding non-discrimination clause stated in the Article III: 4.

C. The Indonesian Cigarette Industry

The Indonesian clove cigarettes were formulated over hundred years ago. It was a man in a small village who suffered from lung problems but enjoyed smoking tobacco. The idea was to add ground cloves to the natural, homegrown tobacco, along with fruits & spices to make a sweet, tasty cigarette to sooth his lungs. Hence, it was manufactured in Indonesia industry, the making of kreteks (what we call "clove cigarettes").

The cigarette industry in Indonesia started in 1975, whereas before that year Indonesia always import their needs for cigarettes from another country. Then, the development of this industry is considered quite rapid, as there is big as well as medium and small cigarettes company. The cigarette industry in Indonesia marked by the foundation of PT. Gudang Garam (Kediri), PT. Sampoerna (Surabaya), PT. Bentoel (Malang), and PT. Nojorono (Kudus). Indonesia is the world's largest cigarette exporter and has been able to maintain their status since 2004 through their clove cigarettes, which is popular worldwide. The Indonesian economy has been benefitted from this industry, as this industry provide a wide job opportunity and the income for the government.

This industry has been able to contribute the biggest tax amount, compared to the other tax, such as tax that comes from the alcoholic drinks. The success of the industry helps the government to solve the unemployment problem that has been a "heritage" in Indonesia and also brings some fortune to the smaller industry. Especially for cigarettes industry, Indonesia has been able to export their cigarettes to some countries, such as Malaysia, Singapore, Philippines, Cambodia, Thailand, United States, and still many more.

However, during the dispute that started in 2009, the export volume of Indonesia's clove cigarette decreases substantially. Proven, Indonesia managed to export 30.196 cigarettes, but only manage to export 9.984 cigarettes in 2009, as the result of the new FDCA regulation. During that period of time, many small-medium cigarette companies in Indonesia went bankrupt because of this policy, and this becomes another problem since the unemployment rate increase in Indonesia. Another thing is, Indonesia suffer lost for 200 Million USD as the amount of exporting those cigarettes into the United States market.

D. Dispute Settlement

The key players involved in the dispute between Indonesia and United States concerning the clove cigarettes is the Government of United States, as well as Indonesia, and one privately held Cigarette Company from Indonesia, named as the Kretek International, INC. Government of United States, specifically from the Food and Drug Administration (FDA) is the key player. The FDA department has the control over the cigarette, as one category of the Federal Food, Drug, and Cosmetic Act (FDCA).

The new act is proposed under the authority of this department as well. The ban on clove cigarettes is depicted in the section 907 in Chapter IX of FDCA, saying that the bans will be implemented on the type of cigarettes that have an ingredient of herb or spices, and this is "clearly characterize the source of flavor that comes in the tobacco product". However, this section clearly liberates the menthol cigarettes to be freely sold in the market.

It was the first major FDA action against tobacco manufacturers since being granted the right to regulate cigarettes under the Family Smoking Prevention and Tobacco Control Act signed by President Obama in June. The ban affects not just flavored tobacco, but flavored filters and cigarette rolling papers that contain "...strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice,

cocoa, chocolate, cherry, or coffee. The rules will make it next to impossible for teens to obtain or even roll their own, flavored cigarettes.

United States, through their Director of the FDA Lawrence Deyton, stated the basis of the new act applied regarding the flavor cigarettes. In an interview, Deyton quotably saying that the flavor cigarette is the "gate" for teenager and adults to become a conventional smoker. A research indicates that when a person starts smoking at the age of 17 have triple chance to continue smoking compared to those who starts smoking at the age of 25, and 90% of adult smokers started to smoke since they were teenager [12]. Based on those facts, then the FDA considers that the flavor cigarettes might become a "temptation for beginner", that make someone become a smoker. In this case, FDA has the interest to protect the generation of teenagers and youths from smoking habit.

In the opposite site, the government of Indonesia also becomes a major player in this case. As mentioned previously, Indonesia filed a complaint on the World Trade Organization regarding the new policy on the FDCA section. Indonesia, through their Ministry of Trade plays an important role to solve this case in the WTO. Under the Director General of International Trade Cooperation stated that Indonesia will try their best to seek justice and fairness, if they are treated unfairly in the trade practices, such as in this case since Indonesia also a member of the WTO; thus, Indonesia has the same rights with the other members.

Kretek International Inc. is one company that is involved directly with this case. Kretek International Inc. is privately held company founded back in 1982, with current headquarter located in Endeavour Court, Moorpark, California, United States. Kretek International is focusing on the distribution as well as marketing field in specialty tobacco cigarettes. They are the authorized United States Marketer that has the license to sell the imported cigarettes from Djarum (Indonesia), and Dream Cigars.

Need to be noted, Kretek International do not sell the cigars to end customers, they will only serve wholesalers and distributors who have license. In 2009 when the FDCA started to be implemented, then Kretek International as the distributor of clove cigars from Indonesia must be heavily impacted by the new regulation.

The proponent side in this case is the United States. United States, through their FDCA renew their regulation related to the sales of clove cigarettes that are mainly imported in Indonesia to be prohibited to sold in the United States market. United States FDA argue that these clove cigarettes is included in the criteria of flavor cigarettes, and therefore the sales will be banned by the government starting on September 2009. Since the ban done by the government of the United States disadvantages another party (in this case Indonesia, as the exporter of clove cigarettes), then the proposed strategy will be made to the respect of United States.

IV. DISCUSSION

Since the one who “trigger the fire”, then there is a lot of inconsistency of this case. Firstly, United States argue that they would like to save their teenage and youth generation from smoking habit, by preventing the flavor cigarettes to be sold since flavor cigarettes cause a temptation because of its sweet taste on the lips on the smoker. They also have elaborated the facts related to the people who become an active smoker. It is a good deed by the government of the United States as they concern about the future of their young generation, however the way they took to “save” their young generation comes at the cost of the other country interest [13].

Besides the argument, FDA also does not ban the menthol cigarettes to be sold in the market. Instead, they don’t include menthol cigarettes as one of the flavor cigarettes even though actually menthol is a flavor, too. A cigarette can be said having flavor when there can create a taste in the mouth of the smoker. Clove cigarettes can create sweet taste on the lips, and menthol also creates cold sensation inside the mouth of the smoker. So it can’t be said that the menthol cigarettes is not a flavor cigarettes actually [14].

The action took by the FDA implies a message that the US government wanted to save their domestic cigarettes producer from heavy competition that comes from Indonesian cigarettes. Proven, the menthol cigarettes should be included in the criteria of flavor cigarettes. This policy is considered as inconsistent with the act they have just signed. However, since menthol is produced inside the country then United States government doesn’t implement the ban on it. There are several strategies that can be proposed in order to avoid this kind of ban from happening again [15].

Since this kind of ban will surely impacting other parties even if it’s done in the future, then here are some strategies that the United States can address the problem as well as the resulting consequences to the parties who are involved. This band-act causes a massive labor lay-off in Indonesia during that period of time so it is quite clear how severe the multiplier effect of executing this act. Protecting domestic industry at the cost of the economy of other party is not an appropriate step taken by the US government and it can be considered as a blunder, considering the end result prove that Indonesia won this case [16]. Next time before a decision is made, US government should review it again so it doesn’t bring any bad impact towards the stakeholder, and won’t embarrass them.

US government should also consistent with their decision, whereas all decision made should be clear so that it would not create such an ambiguity. In this case, government of the United States, specifically the FDA department seems fail to understand the product characteristics of menthol and kretek cigarettes (like products). Both of them have their special flavor even though the not similar. However, since kretek is banned, then menthol should be banned too. Not banning the menthol cigarettes can create an image that the country’s government doesn’t have a sense of fairness, moreover for import products. If US Government keeps doing this, in the long term would obviously discourage any country that becomes a trading partner with United States, as those country might walk away from building a relationship among countries

and choose another country that is more reliable in terms of trade [18].

Government of United States can impose new regulation regarding the sales of cigarette in the country. Since they are trying to protect young people to smoke and they argue that flavor cigarettes could tempt them to smoke, then a regulation that says about age limitation to buy cigarettes needs to be implemented. If previously the minimum age to buy some cigarettes is 17, then the government should regulate that those who are allowed to buy cigarettes at a convenience store or everywhere should be at least 20 by showing their ID card (increase minimum age limitation) With this regulation, the trade for cigarettes with Indonesia would still last and United States can still prevent their young generation smoking.

Banning clove cigarettes from the distribution means threatening the internal industry itself. Even though menthol cigarettes would definitely sell more since it can be considered as substitute product, but clove cigarettes definitely have their own segment. Merchant that sells clove cigarettes would definitely suffer from this ban since it will reduce their revenue by selling clove cigarettes. This confirm the previous study, which argue that packaging influences marketing capability [18].

The clove cigarettes itself is believed to have a niche segment in the US market, therefore this would heavily impact the industry as well as the stakeholder. To deal with this, instead of banning then the government can implement some import quota so that the sales of clove cigarettes can be reduced as low as the government want. However, this could increase the risk of inflation, specifically for clove cigarettes since there will be shortage of supply in the market while the demand is quite stable [18].

It is quite understandable for United States to ban a product from being distributed in the country. However, the product that is banned is neither a defect nor doesn’t create any disease. In the end, it could affect Indonesia’s balance of trade account, since the clove cigarettes definitely generates quite a lot of money for Indonesia’s export amount. Therefore, Indonesia would greatly disadvantage for this not clear ban act from US.

As a party who responsible for this, then actually US can ask Indonesia to export some of their export-standard menthol cigarettes to replace the clove cigarettes at a reduced amount than the one they used to import from Indonesia. This would benefit both parties, however US domestic cigarette industry may be threaten by this policy especially the menthol cigarettes. It will face a fierce competition from Indonesia’s menthol cigarettes [19].

Lastly, to smooth the negotiation with Indonesia regarding the ban on clove cigarettes, United States can offer several other things. One thing that US can offer is to increase the trade volume, especially the import volume for another commodity from Indonesia. This step can be considered to occupy the void left in Indonesia’s export account from the clove cigarettes ban. With this kind of strategy, it can help Indonesia to accept the ban executed on their clove cigarettes by US offering a beneficial trade-off for it [20].

This study frames the legal challenge, which was resolved in its own particular context, under its own laws, principles and doctrines, and in accordance with its own legal and evidentiary procedures. In these respects, the High Court's consideration of the tobacco companies' challenges differs from what might be expected if plain packaging were implemented and challenged in domestic jurisdictions in which different rights and interests are protected or promoted—both those weighing in favor of plain packaging, such as public health generally, and rights to health and to life, and in favor of those that tobacco companies would seek to invoke, such as commercial speech rights and different kinds of property rights from those protected by the Australian Constitution [21].

V. CONCLUSION

This article extends the discussion on international trade theory by examining the dispute settlement on cigarette. Using an interpretive-inductive research method, this study argue that dispute settlement system allows the developing countries to transform the diplomatic resolution of the case with legal guidance to a quasi-judicialized system.

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